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81-2057

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of New Jersey

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JURISDICTIONAL STATEMENT

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May 6, 1982

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QUESTIONS PRESENTED

1. Whether the legislatively enacted congressional reapportionment plan with districts which deviate from population equality by less than the statistical imprecision of the census is constitutional.

2. Whether the legislative policy of preserving minority voting strength justifies small deviations from census population equality in a congressional reapportionment plan.

PARTIES BELOW

Appellant Alan J. Karcher is the Speaker of the New Jersey Assembly. Appellant Carmen A. Orechio is the President of the New Jersey Senate. Appellants James J. Florio, William J. Hughes, James J. Howard, Robert A. Roe, Peter W. Rodino, Jr., Joseph G. Minish, Frank J. Guarini, and Bernard J. Dwyer are Democratic Members of Congress from New Jersey. Appellants were permitted to intervene as parties defendant in the proceedings in the district court.

Appellees Edwin B. Forsythe, Matthew J. Rinaldo, Millicent H. Fenwick, Harold C. Hollenbeck, James A. Courter, Margaret S. Roukema, and Christopher H. Smith, Republican Members of Congress from New Jersey, and George T. Daggett, Thomas Dunn, Livio Mancino, Rev. Millard D. Birt, Rafael Fajardo, Margaret Dougherty, Maretta N. Jackson, and C. Joseph Lillo were plaintiffs in the proceedings in the district court.

Appellees Thomas H. Kean, Governor of the State of New Jersey, Irwin Kimmelman, Attorney General of the State of New Jersey, and Jane Burgio, Secretary of the State of New Jersey, were defendants in the district court.

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Appellees.

On Appeal From the United States District Court for the District of New Jersey

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court, App. A, *infra*, is not yet reported.

JURISDICTION

Plaintiff-appellees brought these actions in the United States District Court for the District of New Jersey to enjoin the New Jersey Congressional reapportionment, P.L. 1982, c.1, as a violation of Article 1, Section 2 of the United States Constitution. The cases were consolidated and a three-judge court was properly convened

pursuant to 28 U.S.C. 2284(a). On March 8, 1982 the three-judge court entered a judgment declaring P.L. 1982, c.1 unconstitutional and enjoining the State appellees from implementing it. App.B, *infra*. Appellants, who were intervenors below, filed a notice of appeal in the district court on March 8, 1982. App. C, *infra*. On March 15, 1982, Justice Brennan stayed the judgment pending final determination of this appeal. App. D, *infra*. This Court denied alternative motions to vacate the stay or expedite the proceedings on March 29, 1982, App. E, *infra*, and Justice Brennan denied a motion to modify the stay on April 13, 1982. App. F, *infra*.

The jurisdiction of this court is conferred by 28 U.S.C. 1253.

CONSTITIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 2 of the United States Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within

three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

The New Jersey reapportionment statute, New Jersey P.L. 1982, c.1, is lengthy. It is set forth as an appendix to the district court's opinion. App. A, *infra*, at 15a-20a.

STATEMENT OF THE CASE

On January 19, 1982, New Jersey enacted a reapportionment plan for the election of United States Representatives, P.L. 1982, c.1. That plan, based on the 1980 decennial census data reduced the number of congressional districts from fifteen to fourteen. App. A, 4a-5a. The districts have an average census population deviation of 0.135% and a maximum deviation between the smallest and the largest districts of 0.6984%. *See* App. A, 5a.

The primary legislative criteria for reapportionment was numerical equality. The leadership agreed that no plan would be considered with maximum deviations over one percent and that smaller deviations would be sought. App. A, 6a. The maximum deviations of the resulting

plan are within the margin of error of the 1980 census. Additional legislative criteria were to protect minority voting strength, and to preserve municipal boundaries.

Plaintiff-appellees, on February 2 and 9, 1982 brought these actions against the State appellees to declare P.L. 1982, c.1, unconstitutional and enjoin its use. The cases were consolidated, appellants were permitted to intervene as defendants, and the case was submitted on depositions, affidavits and exhibits without a trial. On March 3, 1982 the three-judge district court, by a divided vote, declared P.L. 1982, c.1, unconstitutional. App. A, *infra*, Judgment was entered on March 8, 1982. App. B, *infra*.

The district court read *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *White* v. *Weiser*, 412 U.S. 783 (1973) as requiring any legislatively drafted congressional redistricting plan to be held unconstitutional if it is possible that a plan with a smaller census population deviation could be developed. The court concluded that such a possibility existed in this case because the legislature and the district court had before them plans with smaller census population deviations. The court did not consider the problems with the plans rejected by the legislature. The court concluded that even if preventing dilution of minority voting strength was a legitimate consideration justifying population deviation, it did not do so in this case because the district with the largest black population (District 10) was not one of those with the highest deviation. App. A, 9a. Finally, the district court rejected appellants' argument that the "as nearly as practicable" standard of *Kirkpatrick* is satisfied when the population deviation is less than the statistical imprecision of the census. The court enjoined the State officials from holding any election under P.L. 1982, c.1, gave the legislature until March 22, 1982 to enact a new plan for reapportionment, and stated that if it did not "this Court will convene on March 26, 1982 to undertake further proceedings." App. A, 32a.

Circuit Judge Gibbons dissented. He held that where the deviation between districts is less than the recognized statistical imprecision in the census, a good faith effort to achieve population equality has been shown as a matter of law:

> [T]he only relevant constitutional consideration, in the absence of a much needed federal statute imposing standards for congressional districting, is the achievement of equal representation for more or less equal numbers of persons. A deviation in population between the largest and the smallest district of 0.6984% is smaller than the recognized margin of undercounting in the census. I would hold that achievement of that small a deviation demonstrates as a matter of law a good faith effort to achieve equal member districts. App. A, *infra*, Gibbons, J., dissenting.

Justice Brennan stayed the district court judgment on March 15, 1982. This Court denied motions to lift the stay, or in the alternative to expedite the proceedings on March 29, 1982, and Justice Brennan denied a motion to modify the stay on April 13, 1982. Appellants now appeal to this Court pursuant to 28 U.S.C. 1253.

THE QUESTIONS ARE SUBSTANTIAL

1. The District Court's Decision Would Require That Most Reapportionment Plans Based on the 1980 Census be Held Unconstitutional.

Since *Baker* v. *Carr*, 369 U.S. 186 (1962), federal courts have reviewed numerous congressional reapportionment plans. In many cases the courts have been required to fashion a remedy because the legislature failed to enact a constitutional plan. In none of these cases has a court invalidated a plan with census population deviations as insignificant as P.L. 1982, c.1. Indeed, legislatively approved redistricting plans with larger census

population deviations have been specifically upheld.[1] Also many courts have implemented court ordered plans with deviations well in excess of the deviations in this case.[2] Significantly, the redistricting plan eventually approved after this Court's decision in *Kirkpatrick* v. *Preisler*, *supra*, contained a maximum deviation of 0.629%—in essence the same deviation as declared unconstitutional by the district court in this case.[3]

Moreover, the district court's approach would invalidate most of the congressional reapportionment plans thus far adopted as a result of the 1982 census. At least seven states have reapportionment plans with a census population deviation larger than P.L. 1982, c.1.[4] Another six have deviations in the range of P.L. 1982, c.1 and larger than some of the alternative plans relied upon by the district court.[5] With today's computer technology it is possible, by ignoring all factors other than population equality, to construct congressional districts exactly equal in census population. Thus the ultimate consequence of the rule adopted by the district court is that any plan

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[1] *See, e.g., Drum* v. *Scott*, 337 F. Supp. 588 (M.D.N.C. 1972); *West Virginia Civil Liberties Union* v. *Rockefeller*, 336 F. Supp. 395 (S.D.W. Va. 1972).

[2] *Doulin* v. *White*, No. LR-C-81-418 (D. Ark. Feb. 25, 1982); *Skolnick* v. *State Electoral Board of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971); *Maryland Citizens Committee for Fair Congressional Redistricting, Inc.* v. *Tawes*, 253 F. Supp. 731 (D. Md.) aff'd *sub nom. Alton* v. *Tawes*, 384 U.S. 315 (1966).

[3] *Preisler* v. *Secretary of State of Missouri*, 341 F. Supp. 1158 (W.D. Mo.) aff'd *sub nom. Danforth* v. *Preisler*, 407 U.S. 901 (1972).

[4] Alabama (2.460%); Georgia (.889%); Indiana (3.095%); Massachusetts (.902%); Tennessee (2.440%); Virginia (1.81%); and West Virginia (2.579%).

[5] Louisiana (.42%); Nebraska (.231%); Nevada (.33%); Oklahoma (.574%); Texas (.30%); and Utah (.43%). The Nevada figure is subject to a forthcoming correction by the Bureau of the Census involving about 1400 people.

which does not come within one person of census population equality is unconstitutional. This would displace legislative policy-making in favor of computer generated plans equal in census population but lacking any other rational policy. And it overlooks the admonition of *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977) (footnote omitted), that:

> "[L]egislative reapportionment is primarily a matter for legislative consideration and determination," [citation omitted] for a State legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial equality.

2. The District Court Erred In Striking Down A Legislative Reapportionment Plan Which Had Population Deviations Within The Statistical Imprecision Of The Census.

The district court in reviewing P.L. 1982, c.1, concluded that alternative congressional reapportionment plans were available with less of a census population deviation. Although the deviations were within the statistical imprecision of the census, the district court concluded that the opinion in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *White* v. *Weiser*, 412 U.S. 783 (1973), required the invalidation of P.L. 1982, c.1.

In reaching its decision, the district court misconstrued this Court's decisions in *Kirkpatrick* and *White*. Moreover, it requires the selection of the plan with the lowest census population deviation over plans which have deviations the functional equivalent of zero.

The deviations in *Kirkpatrick* and *White* were 5.97% and 4.13%, many times the 0.6984% deviation here. Moreover, in *Kirkpatrick* this Court stressed that alternate plans are probative evidence that a population deviation is avoidable where the plans "would have *markedly reduced* population variances among the districts." 394

U.S. at 532 (Emphasis added). And in *White* v. *Weiser*, this Court further clarified the principle of "unavoidability" created in *Kirkpatrick*. The Court found that a plan cannot pass the constitutional test if "the districts were not as mathematically equal as *reasonably* possible." 412 U.S. at 790. (Emphasis added).

In this case the selection of the available alternatives would not have "markedly reduced" the deviations. Nor did the existence of alternatives mean that the districts embodied in P.L. 1982, c.1, were not as "mathematically equal as reasonably possible." The uncontroverted evidence in this case demonstrates that the deviations in P.L. 1982, c.1, because of the statistical imprecision of the census, are the functional equivalent of zero.

As Dr. James Trussell, a demographer at Princeton University, testified:

> [T]he undercount in the 1980 census is likely to be above one percent, once an estimate of the number of the illegal aliens is explicitly included in the demographic equation. . . .
>
> . . . [O]ne cannot make congressional districts of truly equal size if one relies on census counts. Nor is it meaningful to rank one redistricting plan as superior to another when differences in district size are small. In my professional opinion, districts whose enumerated populations differ from one another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion. (Trussell Statement, Para. 13 & 14, DFLH Ex. 5).[6]

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[6] Note: The following nomenclature adopted by the district court will be used to refer to exhibits introduced before the district court at the February 25, 1982 hearing:

1. J.Ex. = Affidavits, bills and depositions agreed upon as joint exhibits.
2. PFH = Exhibits introduced at hearing by Plaintiffs Forsythe, *et al.*

[Footnote continued on page 9]

Dr. Trussell also found that because these census undercounts are unevenly distributed both in the United States and within the State of New Jersey, no meaningful adjustments can be made to normalize the data. Trussell Statement Para. 13 & 14, DFLH Ex. 5. Consequently, where a known error of approximately 1% exists, it is futile for courts to suggest that alternative plans, even if unflawed, can result in a "markedly reduced population variance . . ." *Kirkpatrick*, 394 U.S. at 532. *See also, Gaffney* v. *Cummings*, 412 U.S. 735, 745-46 (1973).

Judge Gibbons, in the district court below, agreed that any attempt at precision below the tolerance of the yardstick is an exercise in futility. He observed in his dissent:

> It seems to me, therefore, that the rule must be that variances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts. I would read the *de minimus* [*sic*] language in *Kirkpatrick* v. *Preisler* as a prohibition against toleration of *de minimus* [*sic*] dilutions of relative representation rather than as a prohibition against toleration of *de minimus* [*sic*] population variances which have no statistically relevant effect on relative representation. App. A, *infra*, Gibbons, J., dissenting.

The district court's strict reading of *Kirkpatrick* v. *Preisler, supra* and *White* v. *Weiser, supra*, we believe, is not justified by either their language or the purposes for which the Court fashioned the one-man one-vote prin-

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[6] [Continued]

3. DFLH = Exhibits introduced at hearing by Defendant-Intervenor Florio *et al.*, Senate President Orechio, New Jersey Senate, and Assembly Speaker Karcher, New Jersey Assembly.

ciple.[7] As Justice Powell observed in *White* v. *Weiser*, 412 U.S. at 798 (concurring opinion):

> [I] would not have thought that the Constitution—a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions—could be read to require a rule of mathematical exactitude in legislative reapportionment.

And as this Court stated in *White* v. *Weiser* "a district court should . . . honor state policies in the context of congressional reapportionment." 412 U.S. at 795. But if, as the court below concluded, the state must inevitably adopt the plan with the least population variance, there would be no room left for state policies of any kind. As Justice Brennan concluded in granting the stay sought by appellants in this case:

> The appeal would thus appear to present the important question whether *Kirkpatrick* v. *Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey legis-

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[7] In *West Virginia Civil Liberties Union* v. *Rockefeller*, 336 F. Supp. 395, 399 (S.D. W.Va. 1972), a three-judge court in reviewing a legislatively enacted plan found that an attempt at precise mathematical precision in redistricting was neither required by *Kirkpatrick* nor was it practical. In approving a plan which presented a relative deviation of 0.78%, the court observed:

> [I]t would be very difficult to markedly reduce the variances in a plan which, in fact, only varies 0.35% above and 0.43% below the mathematical ideal. Additionally, though marked reduction in the variances involved in [the redistricting law] is not possible, the court must recognize that redistricting plans conceivably could be produced which would reduce variances below those contained in any of the proposals thus far presented, but this would be impractical and *Kirkpatrick* does not require it....

The court there recognized that while other plans offered slight reductions in variances, none offered the "marked reductions" referred to in *Kirkpatrick*. 336 F.Supp. at 400.

> lature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably "statistically insignificant" variances from the constitutional ideal of absolute precision. App. D, *infra*, at 38a.

Justice Brennan's conclusion is reinforced by the fact that other district courts around the nation have considered factors other than census population equality in selecting between plans with insignificant differences in deviations. *Doulin* v. *White*, No. LR-C-81-418 (E.D. Ark., Feb. 15, 1982); *In re Illinois Congressional Districts Reapportionment Cases*, No. 81 C 3915 (N.D. Ill., 1981), aff'd *sub nom. Ryan* v. *Otto*, 50 U.S.L.W. 3546 (U.S. Jan. 11, 1982). Indeed in *Doulin* v. *White*, *supra*, the court, following the "necessary logical implications" (*id.*, Slip Op. at 7) of *White* v. *Weiser*, *supra*, ordered implementation of a plan which had a deviation of 0.78% over alternatives which had deviations ranging from 0.13% to 0.44%.

3. The District Court Erred in Concluding That Preventing the Dilution of Minority Voting Strength Does Not Justify the Deviations in P.L. 1982, c.1.

The district court did not address petitioner's contention that avoiding the dilution of minority voting strength in various congressional districts is, itself, a legitimate constitutional criterion justifying the deviations from precise population equality. Rather, the district court stated that it "need not decide whether this interest is sufficient to justify a deviation from population equality." App. A, *infra*, at 9a. The district court did so because it concluded that there was no exact causal relationship between preserving minority voting strength in the Tenth Congressional District and population variances in other districts.

It is undisputed that the avoidance of the dilution of minority voting strength was an important consideration in the adoption of P.L. 1982, c.1, as opposed to alternatives proposed to the Legislature.[8] Of particular concern was the Newark-based district which had suffered a substantial population loss since the 1970 census.[9] Consequently, the legislature sought to avoid the present and potential dilution of minority voting strength.[10] As the testimony of the New Jersey black leaders reveals, P.L. 1982, c.1, protects minorities from having their vote diluted better than any of the alternatives presented to the legislature and relied upon by plaintiffs in this action, and was supported by black leaders over any of the alternatives for this reason.[11]

There were before the legislature four plans with smaller census population deviations than P.L. 1982, c.1.[12] Two others, submitted to the legislature after P.L. 1982, c.1 became law, were before the district court.[13] Each of

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[8] As the deliberations leading to the adoption of P.L. 1982, c.1 reveal, the avoidance of the dilution minority voting strength was a prime objective in the Legislature's consideration of redistricting alternatives. Karcher Deposition, 125, 133-137, J.Ex.3; Jackman Deposition 12-14, 96, 98-99, 123, 131-34, J.Ex.2; Feldman Deposition 13, 29, 32, 40-46, 61, 80, 94, J.Ex.3.

[9] Karcher Deposition 133, J.Ex.3; Karcher Statement, para.3, DFLH Ex.1.

[10] Karcher Deposition 136-137, J.Ex.3.

[11] Gibson Statement, DFLH Ex. 2; Cooke Aff., DFLH Ex. 3; Woodson Aff. DFLH Ex. 4.

[12] The Kavanaugh I Plan, S-3525/A-3776 (0.346%); the DiFrancesco Plan, S-3547 (0.125%); the Hagerdorn Plan, S-3328/A-3646 (0.195%); the Hartwick II Plan, A-3817 (0.451%). Alito to Aff., J.Ex.7, App.A.

[13] Kavanaugh II Plan, A-615 (0.029%); Bennett II Plan, A-614 (0.136%). Op. 7, Alito Aff., J Ex. 7, App. A.

these alternative plans would have diluted minority voting strength and were properly rejected by the legislature. For example, District Ten, which includes the City of Newark, was about 60% black based on the 1970 census. Due to a decline in the proportion of blacks in the area between 1970 and 1980, some decline in the black voting strength in this district was inevitable. Thus, under P.L. 1982, c.1, the district is 54.8% black. Two alternative plans, however, would have reduced the black population below 50%, a dilution of the black voting strength far more extreme than justified by the demographic shifts.[14]

The district court disregarded this uncontradicted testimony because in its view the avoidance of the dilution of minority voting strength did not explain the deviations in all districts. To retrospectively require the legislature to show precisely how preservation of minority voting strength in one district caused the particular population deviations in other districts, as the district court suggested, imposes an impossible burden on the legislature. It is evident that shifts in one district affect the adjacent districts, and indirectly, districts further away. However, to precisely document these effects may be difficult and is not justified when the plan selected better protects minorities than the available alternatives.

The second reason the district court rejected the appellants' argument respecting dilution of minority voting rights was that P.L. 1982, c.1, failed to include Orange, "a city with a high concentration of minority groups" within the Tenth Congressional District.

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[14] The Kavanaugh I Plan (S-3525/A-3776), would have a District Ten which is only 46.3% black, a full 8.5% less than P.L. 1982, c.1. The Hagerdorn plan (S-3328/A-3646) is even worse; District Ten is only 38.7% black in that plan. Alito Aff., J. Ex. 7, App. B.

It is difficult to see how the district court justifies second-guessing the legislature in this area. Orange itself, though its minority population was not significantly dissimilar in 1970, had been a part of the Eleventh Congressional District in the 1970 reapportionment. To infer from the exclusion of the City of Orange from the Tenth (the inclusion of which would necessitate the removal of a like number of other people, including a large number of blacks) that the legislature did not make a good-faith effort to protect minorities, was inappropriate. It may be that the legislature could have done marginally better in the Tenth for racial minorities, but to do so would have resulted in the adoption of alternatives with other difficulties.

The undisputed record in this case is that the legislature, at all times, sought population equality in drafting P.L. 1982, c.1, in a way that would avoid the dilution of minority voting strength, a constitutionally permissible objective. *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 161-162 (1977) (White, Stevens, Brennan and Blackmun, J.), 430 U.S. at 180 (Stewart and Powell, J., concurring). Given the importance of preventing the dilution of minorities' voting strength, other district courts have consciously sought to protect minorities' interests when drawing court-ordered plans. *See, In re Illinois Congressional District Reapportionment Cases*, No. 81 C 3915 (N.D. Ill. 1981), affirmed *sub nom. Ryan* v. *Otto*, 50 U.S.L.W. 3546 (U.S., Jan. 11, 1982); *Carstens* v. *Lamm*, Civ. No. 81-F-1713 (D. Colo., Jan. 26, 1982). Similarly, the legislature was within its constitutional prerogative when it adopted P.L. 1982, c.1, because it protected minority interests better than the handful of alternatives before it with slightly lower census population deviations.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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May 6, 1982

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-297

GEORGE T. DAGGETT,
Plaintiff,
v.
IRWIN I. KIMMELMAN, ETC., *et al.*,
Defendants.

and

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.*,
Plaintiffs,
v.
THOMAS H. KEAN, ETC., *et al.*,
Defendants.

[Filed Mar. 3, 1982]

OPINION

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Before: GIBBONS, Circuit Judge; FISHER, Chief District Judge; BROTMAN, District Judge.

FISHER, Chief District Judge.

These consolidated cases bring under attack the constitutionality of P.L. 1982, c.1, which creates districts for the election of United States representatives from New Jersey. Plaintiffs are concerned citizens, representatives of interested groups, incumbent Republican members of Congress, and other individuals with various interests. The defendants are the Governor, Attorney General and Secretary of State of New Jersey.

We have permitted the incumbent Democratic members of Congress and other concerned persons to intervene as defendants. We have reserved decision on the motions to intervene of still others. Because of the decision here, their status will remain unchanged.

This three-judge court was convened pursuant to 28 U.S.C. § 2284(a). The relief sought includes a declaration that P.L. 1982, c.1 is unconstitutional and an injunction against the state officers to prevent them from implementing the Act by proceeding with the primary election insofar as it relates to candidates for the House of Representatives.

At a hearing on February 19, 1982, the court directed the parties to take depositions, summarize the testimony,

file affidavits and submit exhibits for final hearing on February 26, 1982. Between these dates, all parties moved for summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure.

At final hearing, the parties agreed that if the motions for summary judgment were denied, they would have no further proofs to advance other than what then comprised the record. Because we prefer to decide the matter on the application for injunctive relief on the entire record, rather than by summary judgment, those motions are denied. The application for a preliminary injunction is consolidated with plaintiff's demand for a permanent injunction into a final hearing pursuant to Fed. R. Civ. P. 65(a). Counterclaims advanced on behalf of some of the parties are dismissed, either because this disposition of the case renders them moot, or because they do not constitute a cause of action.

The 1980 decennial census recorded a population of 7,364,826 for the State of New Jersey. Heretofore, New Jersey had 15 congressional districts constituted by this court in *David v. Cahill*, 342 F. Supp. 463 (D.N.J. 1972). Pursuant to the requirements of 2 U.S.C. § 2a(b), the Clerk of the United States House of Representatives has notified the Governor of the State of New Jersey that, on the basis of the 1980 decennial census, the number of representatives to which the state is entitled has been decreased from fifteen to fourteen. This notification has rendered the present apportionment of congressional districts unconstitutional.

After this notification, it became the duty of the New Jersey legislature to reapportion the fourteen congressional districts in conformity with the mandate of art. I, § 2 of the United States Constitution and the standards of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and the cases that followed. On the day he left office, former Governor Brendan T. Byrne signed a bill sponsored jointly by Senator Matthew Feldman and Assemblyman

Byron M. Baer which then became P.L. 1982, c.1. See Appendix A for Senate Bill 711, which became P.L. 1982, c.1, and a map of the districts as drawn by the Act. This litigation followed.

The facts are clear and, in a general sense, not really disputed. They emerge from the exhibits, the affidavits, and especially from the testimony of Assemblyman Christopher Jackman, Speaker of the 199th Assembly and Speaker *pro tem* of the 200th; Senator Matthew Feldman, President *pro tem* of the Senate; Assemblyman Alan J. Karcher, Speaker of the 200th Assembly; and Assemblyman Richard Zimmer.

The story really begins on August 7, 1981, when Ernest C. Reock, Jr., sent a "model" redistricting proposal to the leadership of the legislature and the Governor. On August 11, 1981, Reock sent the plan to all the members of the legislature. Mr. Reock was, and is, a research professor at Rutgers University since 1950 and Director of the Bureau of Government Research at Rutgers University since 1960. The Bureau of Government Research has three principal functions: to conduct research on problems of state and local government in New Jersey, to develop and to conduct training programs for local government officials in New Jersey, and to provide technical assistance to state agencies and officers, as well as to those members of the public interested in the problems of government.

This plan or proposal, as amended, set forth fourteen congressional districts with an overall absolute range of deviation of 1,556 people and the overall relative range of 0.296%. By contrast, P.L. 1982, c.1, the present law, has an overall absolute range of deviation of 3,674 people and an overall relative range of deviation of 0.6984%.

The Reock proposal prompted a remarkable reply from then Speaker of the Assembly Jackman. The letter is set forth in its entirety as Appendix B. This letter in-

formed Professor Reock that redistricting was the business of the legislature and that the partisan majority had an interest in redistricting and would not subjugate its concerns. He added that Professor Reock's plan had no chance of adoption.

There ensued thereafter a series of meetings between Democratic legislators, congressmen, and other interested persons to discuss the form and content of a redistricting bill. There were also contacts made with some Republican office-holders. Obviously, staff people were at work to develop a plan.

When the 200th legislature convened, a number of redistricting bills were introduced until at last P.L. 1982, c.1 was passed and signed by the Governor.

The deposition testimony indicates that the Democratic leadership was concerned with certain criteria. Assembly Speaker Karcher was interested in minimum deviations. In fact, he stated he was not interested in any bill with a deviation in excess of one percent. His further aims were to protect minority interests, the preservation of cores of pre-existing districts and the preservation of municipal boundary lines. He further indicated that he was interested in preserving the influence in Congress of certain senior Democratic incumbents.

Senator Feldman, who sponsored the bill, indicated that he desired numerical equality as near to zero as possible. As additional priorities, he emphasized the importance of protection of black voters and a desire to keep counties, especially Bergen County, intact as far as possible.

Every congressional redistricting plan must be measured against the requirement of art. I, § 2: "The House of Representatives shall be composed of Members chosen . . . by the People of the several States . . . ." In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court held that "the command of Art. I, § 2 . . . means that as

nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8 (footnote omitted).

The "as nearly as is practicable" standard was discussed in *Kirkpatrick v. Preisler*, 394 U.S. 526. In that case, the Court struck down a Missouri redistricting plan which contained a 5.97% total deviation. Missouri's primary argument was that the population variances were so small that they should be considered *de minimus*. The Court, however, ruled otherwise.

> We reject . . . [the] argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimus* and to satisfy without question the "as nearly as practicable" standard. . . . [Rather], the . . . standard requires that the State make a good faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

394 U.S. at 530-31 (citation omitted). See also *Wells v. Rockefeller*, 394 U.S. 542 (1969).

In *White v. Weiser*, 412 U.S. 783 (1973), the Court declared a Texas plan with a total deviation of 4.13% unconstitutional. After failing to demonstrate that the population variances were unavoidable or justified, the State argued that *Kirkpatrick* and *Wells* should be modified to permit small population variances among congressional districts without requiring the State to justify them. However, the Court ruled that it was "not inclined to disturb *Kirkpatrick* and *Wells*." 412 U.S. at 793.

Finally, in *Chapman v. Meier*, 420 U.S. 1 (1975), the Court held that minor population deviations in state legislative districts do not establish a *prima facie* constitu-

tional violation, "[a]s contrasted with congressional districting, where population equality appears now to be the pre-eminent, if not the sole, criterion on which to adjudge the constitutionality, ..." 420 U.S. at 23 (citations omitted).

P.L. 1982, c.1 can withstand constitutional attack only if the population variances "are unavoidable despite a good-faith effort to achieve absolute equality, or . . . [if] justification is shown." *Kirkpatrick*, 394 U.S. at 531. It is clear that the .6984% population deviation of P.L. 1982, c.1 is not unavoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%. For example, the Reock plan contained a total deviation of .3250%, and only .2960% after it was amended. The DiFrancesco plan, S-3547, introduced on January 4, 1982, had a total deviation of .1253%. The Hardwick plan, A-3817, introduced on January 12, 1982, contained a total deviation of .4515%. The Bennett plan, A-614, and the Kavanaugh plan, A-615, although introduced one day after P.L. 1982, c.1 was signed into law, contain total deviations of .1269% and .0293%, respectively.

In devising a redistricting plan, the Assembly leadership was concerned with drawing districts of equal population. However, this constitutional requirement was viewed as merely aspirational, with appropriate recognition to be given to such factors as the preservation of cores of pre-existing districts, the preservation of municipal boundary lines, and the preservation of the districts of incumbent Democratic Congressmen. Likewise, the Reock plan was rejected because it did not reflect the leadership's partisan concerns. Furthermore, the sponsor of P.L. 1982, c.1 stated on the floor of the Assembly that there cannot be a plan of precise population equality and that it was necessary to balance that factor against other criteria.

The Senate leadership viewed the issue in similar terms. While acknowledging that plans with lower total deviations than P.L. 1982, c.1 existed, the leadership believed that population equality was not the only standard.

Defendant-intervenors contend nevertheless that the population deviations in P.L. 1982, c.1 are justified by the legislature's goal of avoiding the dilution of minority voting strength. The plan makes a conscious effort, defendants argue, to preserve the Tenth District with a configuration and racial composition that makes it probable that a person chosen by black voters will be elected in that district. We need not decide whether this interest is sufficient to justify a deviation from population equality. First, defendant-intervenors have not attempted to demonstrate, nor can they demonstrate, any causal relationship between the goal of preserving minority voting strength in the Tenth District and the population variances in the other districts. The Fourth District contains the greatest variance in excess of the "ideal" district: 1,413 people, or .2666%. The Sixth District contains the greatest variance below the ideal district: 1,290 people, or .2452%. We find that the goal of preserving minority voting strength in the Tenth District is not related in any way to the population deviations in the Fourth and Sixth Districts.

Secondly, it is difficult to reconcile the goal of preserving minority voting strength with P.L. 1982, c.1's treatment of the City of Orange. Orange, a city with a high concentration of minority groups, is placed not in the Tenth District, but in the Eleventh. Defendant-intervenors argue that Orange was left out of the Tenth District so that Irvington and Hillside, towns with an alleged substantial immigration of black residents, could be included. However, projected population shifts may

be considered in drawing a redistricting plan only when "these shifts can be predicted with a high degree of accuracy, ..." *Kirkpatrick*, 394 U.S. at 535. Furthermore, "[f]indings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." *Id.* Defendant-intervenors, having failed to document these expected population shifts, fall far short of this standard.

Defendant-intervenors argue that the "as nearly as practicable" standard is satisfied when the population variation is less than the statistical imprecision of the census. Under this reasoning, defendant-intervenors conclude that the .6984% total deviation of P.L. 1982, c.1 is insignificant and should be considered the functional equivalent of mathematical equality. We reject such an approach. Whatever margin of error was present in the 1980 decennial census, there were similar limitations in the 1960 and 1970 decennial census' when *Kirkpatrick* and *White* were decided. Despite this factor, the Court could not have spoken more clearly. "We reject . . . [the] argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimus* and to satisfy without question the 'as nearly as practicable' standard." *Kirkpatrick*, 394 U.S. at 530.

We conclude that P.L. 1982, c.1 does not comply with the mandate of art. I, § 2 and the standards of *Kirkpatrick* and *White*. Judgment will be entered declaring P.L. 1982, c.1 unconstitutional and enjoining the defendant state officers from conducting primary or general congressional elections under its terms. The legislature will have until March 22, 1982 to enact a new constitutional plan for reapportionment. If one is not forthcoming, this court will convene on March 26, 1982 to undertake further proceedings.

March 3, 1982.

GIBBONS, *Circuit Judge*, dissenting.

I join fully in the court's findings of fact and in the rulings on motions. In particular, I agree that the only effort made by the Democratic legislative leadership to comply with *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) was Mr. Karcher's instruction that no plan would be considered which had a population deviation greater than one per cent, and that the minorities' concentration justification for the deviations which were produced must on this record be rejected as pretextual. Moreover I concede that the majority's conclusion of law, that P.L. 1982, c.1 is unconstitutional, is a quite plausible interpretation of the relevant Supreme Court authorities.[1] Nevertheless, I dissent.

I recognize that in *Kirkpatrick v. Preisler*, *supra*, the court *said* that it rejected the argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimus*. In the same paragraph, however, the Court acknowledged that some population variances could be justified. Since, literally, it would be possible to achieve equal number districts, plus or minus one, by disregarding municipal or even census tract lines, the Court must have meant that some considerations other than numerical equality could be relied upon in justification for such variances. Moreover there is no suggestion in the governing cases that even blunt political considerations such as motivated the New Jersey legislative majority are not legitimate considerations.

We must keep in mind that while for congressional redistricting the basic rule, derived from Article 1, Section 2 of the Constitution, is districts of equal population, the purpose of that rule is to prevent the phenomenon of voters in smaller congressional districts hav-

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[1] White v. Weiser, 412 U.S. 783 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). *See*, Chapman v. Meier, 420 U.S. 1, 23 (1975).

ing voting power disproportionate to the voting power of voters in larger districts. The rule requiring apportionment into districts of equal population is itself only an imprecise means to that end, for it is applied not to actual population in each district from time to time, but to population as determined in the decennial census. In any election the population of each district may vary from the ideal. During the course of ten years the variance might be quite large, but the districts determined on the basis of census equality still would be valid. We know, moreover, that the census, while it is amazingly accurate, does not achieve one hundred percent accuracy. It has been estimated that for the 1970 census the margin of error resulting from undercounting may have been as much as 2.5% nationally and 2.6% in New Jersey. *See*, Bureau of the Census, Current Population Reports, Special Studies, Coverage of Population in the 1970 Census and Some Implications for Public Programs (August 1975).

We are not dealing with an equal protection problem, for we know from the cases dealing with apportionment for state legislatures and local governmental units that deviations in excess of those in P.L. 1982, c.1 are tolerable. *E.g.*, *Chapman v. Meier*, 420 U.S. 1 (1975). Thus the *Kirkpatrick v. Preisler* rule is one implied from the clause in Article I of the constitution apportioning representation in the House of Representatives in accordance with the constitutionally decennial census. The basic purpose of that clause is to prevent disparities in representation among the states. Even for that purpose the constitutionally mandated decennial census measurement is imprecise. It is no less so when the same measurement is used for districting within a state.

It is conceivable that the Court would hold that only such imprecision as is built into the constitutional standard is tolerable, and no more. The Court has not done so. Instead it has suggested that some justification for

variances may be advanced. It seems to me, therefore, that the rule must be that variances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts. I would read the *de minimus* language in *Kirkpatrick v. Preisler* as a prohibition against toleration of *de minimus* dilutions of relative representation rather than as a prohibition against toleration of *de minimus* population variances which have no statistically relevant effect on relative representation. A plus-minus deviation of 0.6984% falls within the latter category.

The apportionment map produced by P.L. 1982, c.1 leaves me, as a citizen of New Jersey, disturbed. It creates several districts which are anything but compact, and at least one district which is contiguous only for yachtsmen. While municipal boundaries have been maintained, there has been little effort to create districts having a community of interests. In some districts, for example, different television and radio stations, different newspapers, and different transportation systems serve the northern and southern localities. Moreover the harshly partisan tone of Speaker Christopher Jackman's letter to Ernest C. Reock, Jr. is disedifying, to say the least. It is plain, as well, that partisanship produced artificial bulges or appendages of two districts so as to place the residences of Congressmen Smith and Courter in districts where they would be running against incumbents. But none of my concerns as a citizen are relevant to the standard which I must apply as a judge. Indeed the same partisan ends could have been achieved by tinkering with census tracts rather than whole municipalities thereby reducing population deviations to close to zero.

This is not a case in which district lines were drawn in order to disadvantage racial minorities or religious groups. Republican members of the House of Representa-

tives are not, at least to date, considered to be members of a discrete and insular minority. Thus the only relevant constitutional consideration, in the absence of a much needed federal statute imposing standards for congressional districting, is the achievement of equal representation for more or less equal numbers of persons. A deviation in population between the largest and the smallest district of 0.6984% is smaller than the recognized margin of undercounting in the census. I would hold that achievement of that small a deviation demonstrates as a matter of law a good faith effort to achieve equal member districts.

APPENDIX A

SENATE, NO. 711

STATE OF NEW JERSEY

INTRODUCED JANUARY 12, 1982

By Senator FELDMAN

(Without Reference)

AN ACT creating districts for the election of members to the House of Representatives of the United States of America to serve in the 98th Congress and each subsequent Congress, and repealing sections 1 and 2 of P.L. 1966, c. 156 and P.L. 1981, c. 561.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Congressional District Act for the State of New Jersey (1982)."

2. For the purpose of electing members of the House of Representatives of the United States of America from the State of New Jersey to serve in the 98th Congress and each subsequent Congress, the State of New Jersey shall be divided into the following 14 single-member districts:

First. The county of Gloucester and that portion of the county of Camden embracing Audubon, Audubon Park, Barrington, Bellmawr, Berlin, Berlin township, Brooklawn, Camden, Chesilhurst, Clementon, Gibbsboro, Gloucester city, Gloucester township, Haddonfield, Haddon Heights, Hi-Nella, Laurel Springs, Lindenwold, Mag-

nolia, Mount Ephraim, Pine Hill, Pine Valley, Runnemede, Somerdale, Stratford, Tavistock, Voorhees, Waterford, Winslow, and Woodlynne.

Second. The counties of Salem, Cumberland, Cape May, and Atlantic that pc tion of the county of Ocean embracing Barnegat, Barnegat Light, Beach Haven, Eagleswood, Harvey Cedars, Little Egg Harbor, Long Beach, Ocean, Ship Botton, Stafford, Surf City, Tuckerton, and that portion of the county of Burlington embracing Bass River, Tabernacle and Washington.

Third. That portion of the county of Monmouth embracing Aberdeen, Allenhurst, Asbury Park, Atlantic Highlands, Avon, Belmar, Bradley Beach, Deal, Eatontown, Englishtown, Fair Haven, Hazlet, Highlands, Interlaken, Keansburg, Keyport, Loch Arbour, Long Branch, Manalapan, Manasquan, Matawan, Middletown, Monmonth Beach, Neptune city, Neptune township, Oceanport, Ocean, Red Bank, Sea Bright, Sea Girt, South Belmar, Spring Lake, Spring Lake Heights, Union Beach, West Long Branch, that portion of the county of Ocean embracing Bay Head, Brick, Lakewood, Mantoloking, Point Pleasant Beach, Point Pleasant, and that portion of the county of Middlesex embracing Old Bridge.

Fourth. That portion of the county of Burlington embracing Beverly, Bordentown city, Bordentown township, Burlington city, Burlington township, Chesterfield, Cinnaminson, Delanco, Delran, Edgewater Park, Florence, Mansfield, Maple Shade, Palmyra, Pemberton borough, Pemberton township, Riverside, Riverton borough, Springfield, Willingboro, Wrightstown and Fieldsboro, that portion of the county of Camden embracing Merchantville and Pennsauken, that portion of the county of Mercer embracing East Windsor, Ewing, Hamilton, Highstown, Lawrence, Trenton, Washington and West Windsor, that portion of the county of Middlesex embracing Plainsboro and that portion of the county of

Monmouth embracing Allentown, Roosevelt and Upper Freehold.

Fifth. That portion of the county of Bergen embracing Allendale, Closter, Cresskill, Demarest, Harrington Park, Haworth, Ho-ho-kus, Mahwah, Midland Park, Montvale, Northvale, Old Tappan, Oradell, Park Ridge, Ramsey, Ridgewood, River Edge, River Vale, Rockleigh, Saddle River, Upper Saddle River, Waldwick and Wyckoff, that portion of the county of Hunterdon embracing Alexandria, Bethlehem, Bloomsbury, Delaware, East Amwell, Flemington, Franklin, Frenchtown, Hampton, Holland, Kingwood, Lambertville, Milford, Raritan, Stockton, Union, West Amwell and that portion of the county of Mercer embracing Hopewell, Hopewell township and Pennington, that portion of the county of Morris embracing Boonton, Boonton township, Denville, Jefferson, Mine Hill, Montville, Mount Arlington, Mount Olive, Randolph and Roxbury, that portion of the county of Passaic embracing Ringwood and West Milford, that portion of the county of Sussex embracing Branchville, Frankford, Hampton, Lafayette, Montaque, Sandyston, Stillwater, Sussex, Vernon, Walpack and Wantage and that portion of the county of Warren embracing Alpha, Belvidere, Blairstown, Franklin, Greenwich, Hackettstown, Hardwick, Harmony, Hope, Knowlton, Liberty, Lopatcong, Oxford, Pahaquarry, Phillipsburg, Pohatcong, Washington, Washington township and White.

Sixth. That portion of the county of Middlesex embracing Carteret, East Brunswick, Edison, Helmetta, Highland Park, Metuchen, Milltown, New Brunswick, Perth Amboy, Piscataway, Sayerville, South Amboy, South Plainfield, South River, Spotswood and Woodbridge and that portion of the county of Union embracing Linden, Rahway and Winfield.

Seventh. That portion of the county of Mercer embracing Princeton, Princeton township, that portion of

the county of Middlesex embracing Cranbury, Dunellen, Jamesburg, Middlesex, Monroe, North Brunswick and South Brunswick, that portion of the county of Monmouth embracing Freehold, Freehold township, Marlboro and Millstone, that portion of the county of Somerset embracing Bound Brook, Franklin, Manville, Millstone, North Plainfield, Rocky Hill and South Bound Brook and that portion of the county of Union embracing Clark, Cranford, Elizabeth, Fanwood, Garwood, Plainfield, Roselle, Roselle Park, Scotch Plains and Westfield.

Eighth. That portion of the county of Bergen embracing Franklin Lakes, Garfield, Oakland and Wallington, that portion of the county of Morris embracing Butler, Dover, Kinnelon, Lincoln Park, Pequannock, Riverdale, Rockaway, Rockaway township, Victory Gardens and Wharton and that portion of the county of Passaic embracing Bloomingdale, Clifton, Haledon, Hawthorne, North Haledon, Passaic, Paterson, Pompton Lakes, Prospect Park, Wanaque and Wayne.

Ninth. That portion of the county of Bergen embracing Alpine, Bergenfield, Bogota, Carlstadt, Cliffside Park, Dumont, East Rutherford, Edgewater, Elmwood Park, Emerson, Englewood, Englewood Cliffs, Fair Lawn, Fairview, Fort Lee, Glen Rock, Hackensack, Hasbrouck Heights, Hillsdale, Leonia, Lodi, Maywood, Moonachie, New Milford, Norwood, Paramus, Ridgefield Park, Rochelle Park, Rutherford, Saddle Brook, South Hackensack, Teaneck, Tenafly, Teterboro, Washington, Westwood, Woodcliff Lake and Wood-Ridge.

Tenth. That portion of the county of Essex embracing East Orange, Glen Ridge, Irvington, Newark and South Orange, that portion of the county of Union embracing Hillside, and that portion of the county of Hudson embracing Harrison.

Eleventh. That portion of the county of Bergen embracing North Arlington, that portion of the county of

Essex embracing Belleville, Bloomfield, Caldwell, Cedar Grove, Essex Fells, Fairfield, Livingston, Lyndhurst, Maplewood, Montclair, North Caldwell, Nutley, Orange, Roseland, Verona, West Caldwell and West Orange, that portion of the county of Hudson, embracing East Newark, Kearny and Secaucus, that portion of the county of Morris embracing East Hanover, Mountain Lakes and Parsippany-Troy Hills, and that portion of the county of Passaic embracing Little Falls, Totowa and West Paterson.

Twelfth. That portion of the county of Essex embracing Millburn, that portion of the county of Hunterdon embracing Califon, Clinton, Clinton township, Glen Gardner, High Bridge, Lebanon, Lebanon township, Readington and Tewksbury, that portion of the county of Morris embracing Chatham, Chatham township, Chester, Chester township, Florham Park, Hanover, Harding, Madison, Mendham, Mendham township, Morris Plains, Morris township, Morristown, Netcong, Passaic and Washington, that portion of the county of Somerset embracing Bedminster, Bernards, Bernardsville, Branchburg, Bridgewater, Far Hills, Green Brook, Hillsborough, Montgomery, Peapack-Gladstone, Raritan, Somerville, Warren and Watchung, that portion of the county of Sussex embracing Andover, Andover township, Byram, Franklin, Fredon, Green, Hamburg, Hardyston, Hopatcong, Newton, Ogdensburg, Sparta and Stanhope, that portion of the county of Union embracing Berkeley Heights, Kenilworth, Mountainside, New Providence, Springfield, Summit and Union township and that portion of the county of Warren embracing Allamuchy, Frelinghuysen, Independence and Mansfield.

Thirteenth. That portion of the county of Burlington embracing Eastampton, Evesham, Hainesport, Lumberton, Medford Lakes, Medford, Moorestown, Mount Holly, Mount Laurel, New Hanover, North Hanover, Shamong, Southampton, Westhampton and Woodland, that portion

of the county of Ocean embracing Beachwood, Berkeley, Dover, Island Heights, Jackson, Lacey, Lakehurst, Lavallette, Ocean Gate, Pine Beach, Plumsted, Seaside Heights, Seaside Park, South Toms River and Manchester, that portion of the county of Monmouth embracing Brielle, Colts Neck, Farmingdale, Holmdel, Howell, Little Silver, Rumson, Shrewsbury, Shrewsbury township, Tinton Falls and Wall and that portion of the county of Camden embracing Cherry Hill, Collingswood, Haddon, Lawnside and Oaklyn.

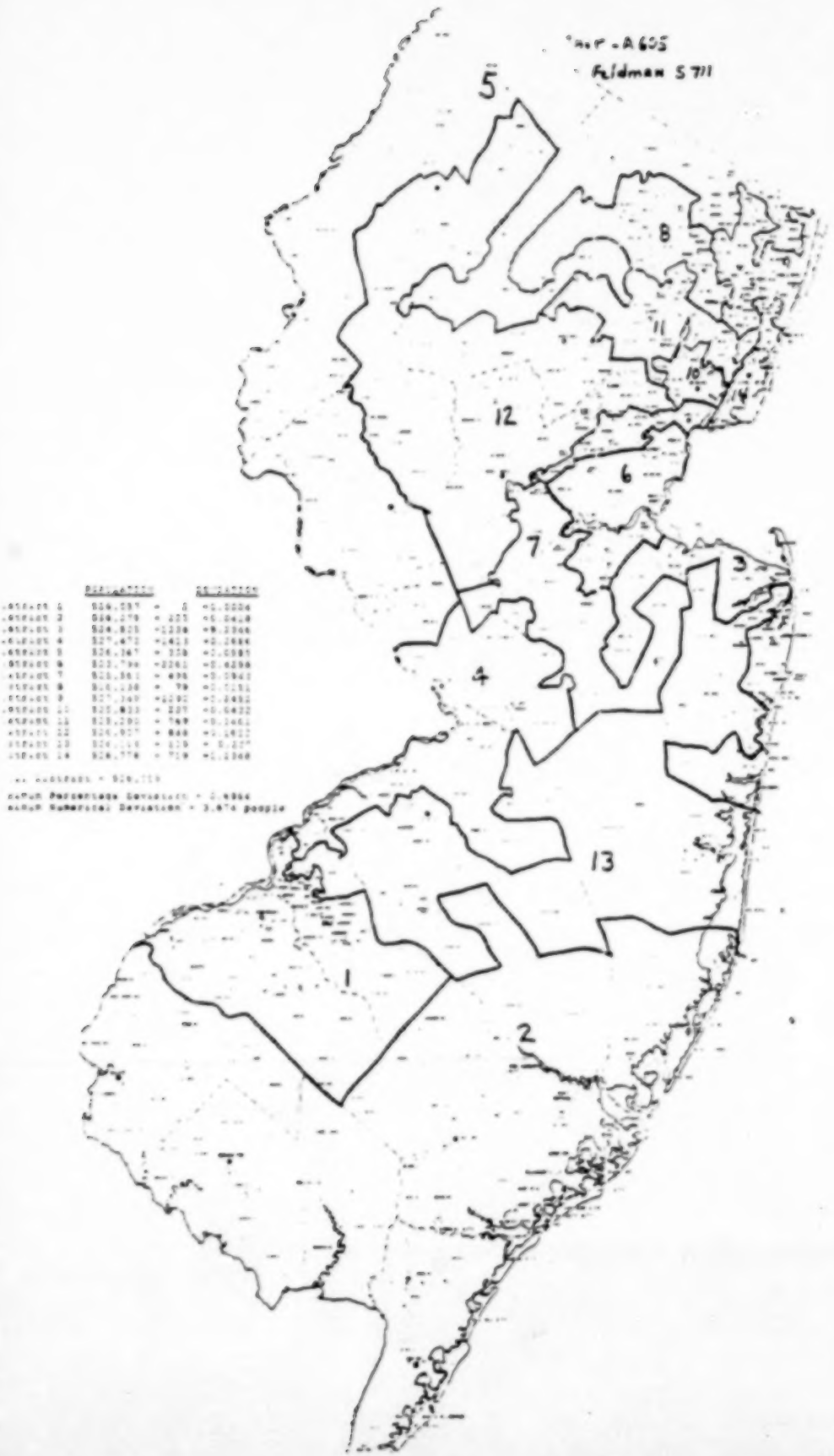
Fourteenth. That portion of the county of Bergen embracing Little Ferry, Palisades Park and Ridgefield and that portion of the county of Hudson embracing Bayonne, Guttenberg, Hoboken, Jersey City, North Bergen, Union city, Weehawken and West New York.

3. Sections 1 and 2 of P.L. 1966, c. 156 (C. 19:46-2 and 19:46-3) and P.L. 1981, c. 561 are repealed.

4. This act shall take effect immediately.

STATEMENT

The purpose of this bill is to create 14 Congressional Districts for use beginning with the 98th Congress.


Kaufman A605
Feldman S711
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APPENDIX B

[SEAL]

GENERAL ASSEMBLY
OF NEW JERSEY
TRENTON

SPEAKER
CHRISTOPHER J. JACKMAN
Assemblyman, District 33
(Hudson)
4110 Monitor Place
West New York, N.J. 07043

Res. 201-868-2637
Bus. 201-861-0961
Leg. Off. 201-861-7266

August 28, 1981

Ernest C. Reock, Jr.
Director
Bureau of Government Research
Rutgers University
New Brunswick, New Jersey 08403

Dear Mr. Reock:

I recently received your letter and plan for New Jersey Congressional districts. I want to thank you for the time and effort you put into your paper. As a principle in the process which will decide New Jersey's Congressional boundaries for the next decade, I have taken this opportunity to respond to your report.

After reading your report I am struck by the suggestion that adherence to the criteria in your report will produce one and only one "fair" map. A further suggestion that this single map then serve as the standard against which all other plans be measured seems to me somewhat presumptious. In fact I am certain that no

single scientifically developed blueprint can be applied in the case of Congressional Apportionment. It is clear that a variety of proposed plans and possible approaches must be explored, all of which have merits as being fair.

Political fairness as it applies to Congressional redistricting is an illusive concept which as you know is often used as a smokescreen for partisan political advantage. Redistricting is a process necessarily comprised of many diverse interests and subjective judgements. Just as several doctors evaluating the same patient could offer several differing but valid opinions, so it is true that those who are directly involved in the apportionment process would be ill advised to set out in the preconceived notion that only one opinion or standard should be recognized. To call your redistricting plan "fair" in comparison to all other plans seems little more than an academic shell game.

In addition I am concerned that assertions about fairness and your urging about establishing standards without recognition of the political process may deny the very real political nature of apportionment. Congressional redistricting is a matter taken up by the entire Legislature. Legislators are elected as members of parties. Those legislators and their parties represent communities of interest which bind members together. Political parties serve to form governing coalitions, without which politics would be in total chaos. The strength of the party-system depends on many varied and quite intricate relationships. As such, the issues inherent in apportionment have come to be defined by parties, negotiated by parties and ultimately solved by parties.

The Federal Courts have utilized very definable features in judging the comparative merits of Congressional apportionment plans. You discuss in your paper the requirements for districts that are contiguous and compact, which do not divide municipalities and adhere to county boundaries wherever possible, which recognize shifts in

populations from older to new communities, and which take into account the previous districts which are being changed. You also recognize that these factors are often in competition with each other and that a sense of priority must be attached to these criteria. When two or more criteria are at odds how should decisions be made? Although we must resort to guessing at judicial intentions, it is regrettable that such decision criteria were not included in your report. While you adequately explain that your proposal does meet judicial standards you do not engage in the more technical discussion of why this plan is better than other possible plans. Statements alluding to its superiority are left unsubstantiated.

In addition to the definable and perhaps measurable criteria by which you drew your plan, apportionment is a political process. No apologies need be made for interests which exist and the pressures which bear upon those who are burdened with the decisions of apportionment. Although you are obviously quite well versed in redistricting law and history, your paper is silent on the important role of community-level politics in apportionment decisions. It is perhaps the process within which Congressional redistricting occurs which dictates its outcome. Without changing the prescribed apportionment process in New Jersey and in other states, it is unlikely that your plan has any chance of adoption. With this in mind, as I'm sure you are aware, it is difficult to understand how you expect legislative action to coincide with your views of the "fairest" plan possible. Why, indeed did you concentrate on alternatives for the solution without even mentioning the political process through which it must pass?

With this in mind, it may be useful to examine the redistricting process and the context within which the New Jersey legislative takes up the issue.

Here in New Jersey the Democratic Party has control over the Congressional apportionment process for the first time ever. This occurs, as you know, because Democrats

hold a majority in both houses of the legislature, as well as being represented in the Governor's seat. Ten years ago, and during every Congressional redistricting in New Jersey's history, Republicans played the predominant role. Each time Republicans sought to legislate districts which would maximize their representation in Congress. And each time Republicans drew districts which were intended to improve upon the previous partisan Congressional representation.

Well, an interesting thing happened along the way—as I'm sure you are aware: the Democratic Party became the dominant party in New Jersey; the party considered more representative of the needs and wishes of New Jersey voters. In the last ten years—under a court-ordered adaptation of a Republican plan—Democratic Congressional candidates have overwhelmingly been the choice of the voters. In those years Democrats have never held less than 8 of the 15 Congressional districts and as many [as] 12. Furthermore, Democratic electoral dominance over the past decade can be established by reviewing the party representation amongst the major political offices. Over the period in which the current districts have been in place, Democrats have dominated the State House at all levels, represent the bulk of the Congressional delegation, and now represent both United States Senators.

The political analysis used to justify your plan employs election results from 1979 and 1980 only. It is my estimation that in determining the best plan for Congressional districts—districts that will be in place for the next ten years—election results from the previous ten years should be taken into account. Of course, more recent elections may be given more weight, but not to the total exclusion of other election data. From my point of view, the 1980 election results are not entirely indicative of the state of partisan politics in New Jersey. There is no doubt that the Democratic party under the leadership of Jim Florio, our gubernatorial candidate, will continue

to enjoy great success amongst the voters of New Jersey. Our representatives in Congress should, as closely as possible, parallel the sentiments of New Jersey voters.

It is in fact interesting that you make use of past election data in defining the expected partisan makeup of your plan. As I'm sure you are aware, others who have made suggestions as to the improvement of political fairness in the apportionment process, tend to shun the use of such political information, perhaps exclude it altogether. Nonetheless, since you have reviewed past election data you must surely expect all others involved in this process to do likewise. Given the process by which the Legislature decides upon a plan how can you expect members of the Legislature to ignore election data which would perhaps lead to other Congressional district configurations more beneficial to party members? You in essence are asking Democrats to subjugate their interests and in effect ignore political election results in order to accommodate your opinions on the "ideal" apportionment plan.

Congressional redistricting in New Jersey must also be viewed from the more broad-based national perspective. The Republican party is only 27 votes short of absolute control of Congress. With a shift of population and consequently Congressional seats from the traditionally Democratic urban industrial states to the more Republican dominated sun-belt states the redistricting process is viewed by Republicans as an opportunity to close that 27 vote margin, or perhaps even overcome it entirely. Toward this end the Republican National Committee (RNC) has undertaken a widely publicized and well-financed redistricting program. Their strategy, as the following examples illustrate is to maximize the Republican potential in those states where they control the process and attack the Democrats as politically unfair in those states in which the Democrats are involved.

Indiana is a state where the Republican party holds a majority in both houses of the Legislature as well as

being represented in the Governor's office. A state tailor-made for the RNC strategy, they sent in a team of technical advisors and managed a bill through the Legislature which was later signed into law by the Governor. By packing all the available Democratic population into the three already heavily Democratic districts and dividing the remaining Democratic population amongst several otherwise Republican districts they hope to see the Congressional delegation change dramatically. From a current delegation of 6 Democrats and 5 Republicans the new redistricting plan intends to dump 3 Democrats, thus returning a delegation of 3 Democrats and 7 Republicans to Congress next year. (Indiana like New Jersey loses one seat next year.)

Republicans also saw a great opportunity in Washington State, where they dominate the apportionment process at all levels. Following closely on their tremendous "success" in Indiana, Republicans rammed a redistricting plan through the Legislature in April. The plan intended to change the Congressional delegation from 5 Democrats and 2 Republicans to perhaps only 3 Democrats and 5 Republicans. (Washington gains an additional seat.) Republican Governor Spellman vetoed the plan, however, as too extreme. The next effort will not be made until later this year.

In Colorado the Republicans who control both houses of the Legislature must contend with Democratic Governor Richard Lamm on redistricting. The Republicans have already passed and the Governor has vetoed two plans which are intended to shift the Congressional delegation from the current 3 Democrats and 2 Republicans to 1 Democrat and 5 Republicans. (Colorado gains a seat.) The Republicans have now countered with nearly a half million dollar TV advertising blitz aimed at discrediting Lamm as playing partisan politics—in essence being politically unfair. Without going into great detail over what the Colorado Republicans have in mind you can see that the Democrats are up against heretofore unheard

of tactics in the battleground of Congressional redistricting.

Against heavy odds, in the person of a popular and powerful President and the fundraising and organizational capability he represents, Democrats are wary of partisan politics. Democrats, even when successful are often on the defensive and appear open to just those media-hyped "fairness" arguments put forth in your work. The fact of the matter is that I feel very strongly that your Congressional redistricting plan is little more than an academic statement of *your* views of the desired outcome. Perhaps unwittingly, you play into Republican strategies quite well. Of course Republican spokesmen will deny any involvement or perhaps interest in your plan. But you can bet that in response to whatever Democrats propose, Republicans will be quick to embrace the "fair" Reock alternative. Political posturing of this nature is expected, but should be taken only for the rhetoric it represents.

Having said all this, I would like to add that in no way do I discourage input such as yours into a very complicated, sometimes unwieldy political process. In fact your expertise has been and I'm sure will continue to be of inordinate value to those of us in New Jersey government. It is a measure with which I take the seriousness of your work that such a lengthy response seems in order.

Once again I thank you for the time and effort you have given the issue of Congressional redistricting in New Jersey.

Sincerely,

/s/ Christoper J. Jackman
CHRISTOPHER J. JACKMAN,
Speaker

cc: Honorable Brendan Byrne
Democratic Legislators
Democratic Congressmen

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Hon. JOHN J. GIBBONS

Hon. CLARKSON S. FISHER

Hon. STANLEY S. BROTMAN

Civil Action No. 82-297

GEORGE T. DAGGETT,

Complainant,

—vs—

IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, JANE BURGIO, Secretary of State of the State of New Jersey, CARMEN A. ORECHIO, President of the Senate of the State of New Jersey, and ALAN J. KARCHER, Speaker of the General Assembly of the State of New Jersey,

Defendants,

—and—

Civil Action No. 82-388

EDWIN B. FORSYTHE, MATTHEW J. RINALDO, MILLICENT FENWICK, HAROLD C. HOLLENBECK, JAMES A. COURTER, MARGARET S. ROUKEMA, CHRISTOPHER H. SMITH, THOMAS DUNN, LIVIO MANCINO, REV. MILLARD D. BIRT, RAFAEL FAJARDO, MARGARET DOUGHERTY, MARETT N. JACKSON, and C. JOSEPH LILLO,

Plaintiffs,

—vs—

THOMAS H. KEAN, as Governor of the State of New Jersey, IRWIN KIMMELMAN, as Attorney General

JAMES J. FLORIO, WILLIAM J. HUGHES, JAMES J. HOWARD, ROBERT A. ROE, PETER W. RODINO, JR., JOSEPH G. MINISH, FRANK J. GUARINI, and BERNARD J. DWYER,
Defendants-Intervenors,

CARMINE A. ORECHIO, President of the New Jersey Senate, and ALAN J. KARCHER, Speaker of the New Jersey General Assembly,
Defendants-Intervenors,

of the State of New Jersey, and JANE BURGIO, as Secretary of State of the State of New Jersey,
Defendants.

[Filed Mar. 8, 1982]

JUDGMENT

This matter having been heard by the three-judge Court on February 19 and 26, 1982, and plaintiffs' applications for preliminary and permanent injunctive relief having been consolidated pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, and the Court having considered the proofs adduced by the original and intervening parties and the oral argument and submission of counsel, and the Court having filed its written opinion on March 3, 1982, and good cause appearing therefor,

IT IS, this 8th day of March, 1982

ORDERED, ADJUDGED AND DECREED that judgment be, and it hereby is, entered in favor of plaintiffs and against defendants and defendants-intervenors as provided herein; and it is further

ORDERED, ADJUDGED AND DECREED that that apportionment of congressional districts constituted by this Court in *David v. Cahill* be, and it hereby is, declared unconstitutional in light of the 1980 decennial census; and it is further

ORDERED, ADJUDGED AND DECREED that P.L. 1982, c.1 of the State of New Jersey be, and it hereby is, declared unconstitutional as violative of plaintiffs' rights under Article I, § 2 of the Constitution of the United States; and it is further

ORDERED, ADJUDGED AND DECREED that defendants Thomas H. Kean, Irwin Kimmelman and Jane Burgio be, and they hereby are, preliminarily and permanently enjoined from conducting primary or general congressional elections under the terms of P.L. 1982, c.1; and it is further

ORDERED, ADJUDGED AND DECREED that all counterclaims and crossclaims asserted by the intervenors herein be, and they hereby are, dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the New Jersey Legislature and Governor be, and they hereby are granted until March 22, 1982 to enact a new constitutional plan for reapportionment; and it is further

ORDERED, ADJUDGED AND DECREED that if the Legislature does not enact a new constitutional plan by March 22, 1982, this Court will convene on March 26, 1982 to undertake further proceedings; and it is further

ORDERED, ADJUDGED AND DECREED that this Court will, upon motion of any party to this action returnable on March 26, 1982 rule on the constitutionality of any enacted new reapportionment plan.

HON. JOHN J. GIBBONS
/s/ Clarkson S. Fisher
HON. CLARKSON S. FISHER
Chief Judge U.S.D.J.

HON. STANLEY S. BROTMAN
U.S.D.J.

Defendants-intervenors Florio, et al., Karcher, and Orechio having applied for a stay of the Court's Judgment, on March 8, 1982, and plaintiffs Forsythe, et al and defendants Kean, Kimmelman and Burgio having appeared in opposition thereto, and for the reasons set forth in that transcript of March 8, 1982, and good cause appearing, therefor,

It is on this 8th day of March, 1982

ORDERED that the application for a stay of the Court's Judgment be, and it hereby is, denied.

John J. Gibbons
HON. JOHN J. GIBBONS
U.S.C.J.

/s/ Clarkson S. Fisher
HON. CLARKSON S. FISHER
Chief Judge U.S.D.J.

HON. STANLEY S. BROTMAN
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HON. JOHN J. GIBBONS, United States Circuit Judge,
Court of Appeals for the Third Circuit

HON. CLARKSON S. FISHER, Judge United States
District Court, District of New Jersey

HON. STANLEY S. BROTMAN, Judge United States
District Court, District of New Jersey

Civil Action No. 82-297

GEORGE T. DAGGETT,
Plaintiff,

—VS—

IRWIN I. KIMMELMAN, Attorney General
of the State of New Jersey, *et al.*,
Defendants,

—and—

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.*,
Plaintiffs,

—VS—

THOMAS H. KEAN, as Governor of
the State of New Jersey, *et al.*,
Defendants,

JAMES J. FLORIO, *et al.*,
Defendant-Intervenors.

NOTICE OF APPEAL

Defendant-Intervenors Carmen A. Orechio, President of the New Jersey Senate, Alan J. Karcher, Speaker of the New Jersey Assembly, and James J. Florio, et al., congressional defendants, do hereby, through their counsel appeal the decision of the Court holding P.L. 1982,

c.1 unconstitutional and enjoining the holding of any primary or general elections pursuant to its provisions.

Respectfully submitted,

/s/ Leon J. Sokol
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Attorneys for
Defendant-Intervenors

Dated: March 8, 1982

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-783

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, ET AL.

v.

GEORGE T. DAGGETT, ET AL.

ON APPLICATION FOR STAY

[March 15, 1982]

JUSTICE BRENNAN, Circuit Judge.

Applicants, the Speaker of the New Jersey Assembly, the President of the New Jersey Senate, and eight Members of the United States House of Representatives from New Jersey, have applied to me for a stay pending this Court's review on appeal of the judgment of a three-judge District Court for the District of New Jersey entered March 3, 1982. The judgment declared unconstitutional New Jersey P. L. 1982, c. 1, which creates districts for the election of the United States Representatives from New Jersey, and enjoined the defendant state officers from conducting primary or general congressional elections under the terms of that statute.

On the basis of the 1980 decennial census, the number of United States Representatives to which New Jersey is entitled has been decreased from fifteen to fourteen. Consequently the New Jersey legislature was required to apportion fourteen congressional districts. P.L. 1982, c. 1

is the product of the state legislature's effort to meet that requirement. The District Court found that in drafting P.L. 1982, c. 1, the legislature was concerned not only with drawing districts of equal population as an "aspirational" goal but also with recognizing such factors as the preservation of the cores of preexisting districts, the preservation of municipal boundary lines, and the preservation of the districts of incumbent Democratic Congressmen. P.L. 1982, c. 1 creates 14 congressional districts with an overall absolute range of deviation of 3674 people and an overall relative range of deviation of 0.6984% from the "ideal" of 14 districts of 526,059 persons each. There were, however, several other proposals brought before the legislature that yielded total deviations less than 0.6984%. The opinion for the majority of the District Court says of these:

> "For example, the Roeck plan contained a total deviation of .3250%, and only .2960% after it was amended. The DiFrancesco plan . . . had a total deviation of .1253%. The Hardwick plan . . . contained a total deviation of .4515%. The Bennett plan . . . and the Kavanaugh plan . . . contain total deviations of .1369% and .0293% respectively."

All three judges of the District Court agreed that the constitutionality of P.L. 1982, c. 1 was to be determined under the standard announced in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and its progeny, *e.g.*, *White* v. *Weiser*, 412 U.S. 783 (1973). But the judges divided 2 to 1 on what that standard is. The majority read *Kirkpatrick* as holding that, even if .6984% was to be regarded as a *de minimis* variance,

> "P.L. 1982, c. 1 can withstand constitutional attack only if the population variances 'are unavoidable despite a good-faith effort to achieve absolute equality . . . .' *Kirkpatrick*, 394 U.S. at 531. It is clear that the .6984% population deviation of P.L. 1982,

> c. 1 is not unavoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%."

The dissenting judge, on the other hand, read *Kirkpatrick* to suggest:

> "[V]ariances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts . . . . [*Kirkpatrick* is to be read to announce] a prohibition against toleration of *de minimis* dilutions of relative representation rather than as a prohibition against toleration of *de minimis* population variances which have no statistically relevant effect on relative representation. A plus-minus deviation of 0.6984% falls within the latter category."

The appeal would thus appear to present the important question whether *Kirkpatrick* v. *Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably "statistically insignificant" variances from the constitutional ideal of absolute precision.

The principles that control my determination as Circuit Justice of this in-chambers application were stated in *Rostker* v. *Goldberg*, 448 U.S. 1306 (1980) (BRENNAN, J., in chambers):

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. In a case like the present one, this can be accomplished only if a

> four-part showing is made. First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*, at 1308 (citations omitted).

The importance of a definitive answer from this Court as to the proper interpretation of the *Kirkpatrick* standard is self-evident: Doubtless all 50 states would be assisted by that answer in any review of the apportionment of congressional seats in consequence of the 1980 census. My task is not to adjudicate this application on my own view of the merits of that question, but rather to determine whether there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction of this appeal, and, if so, whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. Neither event can be predicted with anything approaching certainty, but nonetheless it does seem to me that there is a reasonable probability that jurisdiction of the appeal will be noted, and that there is a fair prospect of reversal.

As to the third *Rostker* requirement, I conclude that appellants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the

Legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect the District Court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans are to be preferred to judically constructed plans.

Accordingly, I am today entering an order granting appellants' application for a stay pending the filing of a jurisdictional statement and, if probable jurisdiction is noted, final disposition of the appeal.

SUPREME COURT OF THE UNITED STATES

No. A-783

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, ET AL.,
Appellants,
v.
GEORGE T. DAGGETT, ET AL.

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the appellants and the responses filed thereto,

IT IS ORDERED that the order of the United States District Court for the District of New Jersey, case Nos. 82-297 and 82-388, entered on March 3, 1982 be, and the same is hereby, stayed pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the District of New Jersey is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ William J. Brennan, Jr.,
Associate Justice of the Supreme
Court of the United States

Dated this 15th day
of March, 1982.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-783

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, ET AL.,
Appellants,

v.

GEORGE T. DAGGETT, ET AL.

ON CONSIDERATION of the motion of appellees to vacate the stay entered by Justice Brennan on March 15, 1982 and the requests to expedite docketing of the appeal,

IT IS ORDERED by this Court that the said motion and requests be, and the same are hereby, denied.

March 29, 1982

APPENDIX F

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

April 14, 1982

Jonathan L. Goldstein, Esq.
Hellring, Lindeman, et al.
1180 Raymond Boulevard
Newark, New Jersey 07102

RE: Alan J. Karcher, Speaker,
New Jersey Assembly, et al. v.
George T. Daggett, et al.
A-783

Dear Mr. Goldstein:

Your application to modify stay in the above-entitled case, together with the response filed thereto, has been presented to Justice Brennan. Justice Brennan has endorsed the following on the face of your application:

"Denied
Wm. J. Brennan, Jr.
4/13/82"

Very truly yours,

ALEXANDER L. STEVAS
Clerk
By

KATHERINE DOWNS
Assistant Clerk

rwk
cc: Kenneth J. Guido, Jr., Esq.
Michael R. Cole, Esq.
George T. Daggett, Esq.

Office - Supreme Court, U.S.
FILED
AUG 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of New Jersey

---

JOINT APPENDIX

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APPEAL DOCKETED MAY 6, 1982
PROBABLE JURISDICTION NOTED JUNE 21, 1982

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 2, 1982—Plaintiff Daggett's complaint filed in the U.S. District Court for the District of New Jersey, Civil Action No. 82-297.

February 9, 1982—Plaintiff Forsyth *et al.*'s verified complaint filed in the U.S. District Court for the District of New Jersey, Civil Action No. 82-388.

February 10, 1982—Judge Fisher orders the two cases consolidated for all purposes.

February 16, 1982—Judge Fisher orders Civil Action No. 82-297 dismissed as to defendants Karcher and Orechio, who had not yet been served.

February 17, 1982—Chief Judge Seitz designates Judges Gibbons and Brotman to sit with Judge Fisher as a three-judge court.

February 17, 1982—Motions to intervene as defendants filed by Alan J. Karcher, New Jersey State Senate and Carmen A. Orechio, and James J. Florio, *et al.*

February 18, 1982—Answer filed by proposed defendant-intervenor Karcher.

February 19, 1982—Hearing on plaintiffs' motion for summary judgment, and continued to February 26.

February 19, 1982—Hearings on motions of Alan J. Karcher, Carmen Orechio, and James J. Florio, *et al.*, to intervene as defendants. Motions ordered granted on consent.

February 26, 1982—Hearing held on plaintiffs' motion for preliminary injunction and on cross-motions for summary judgment.

March 3, 1982—Opinion filed declaring P.L. 1982, c. 1 unconstitutional, Judge Gibbons dissenting.

March 8, 1982—Hearing held on motion of defendants-intervenors Florio *et al.* for a stay pending appeal.

March 8, 1982—Order entered granting motions of Alan J. Karcher, Carmen Orechio, and James J. Florio, *et al.*, to intervene as defendants.

March 8, 1982—Judgment and order entered declaring P.L. 1982, c. 1, unconstitutional and enjoining defendants from conducting primary or general Congressional elections under it; and denying defendant-intervenors Florio *et al.*'s motion for a stay pending appeal.

March 8, 1982—Notice of appeal filed by defendant-intervenor Florio *et al.*

March 11, 1982—Order amending opinion filed.

PLAINTIFFS' EXHIBIT NUMBER 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 82-297

GEORGE T. DAGGETT,
Complainant,

vs.

IRWIN I. KIMMELMAN, *et als.*,
Defendants.

and

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et als.*,
Plaintiffs,

vs.

THOMAS H. KEAN, *et als.*,
Defendants.

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MIDDLESEX)

AFFIDAVIT OF ERNEST C. REOCK, JR.

ERNEST C. REOCK, JR., being duly sworn, deposes and says:

1. I am a research professor and Director of the Bureau of Government Research at Rutgers University. I have been a member of the Rutgers faculty since 1950, and Director of the Bureau of Government Research since 1960. In addition to undergraduate degrees in mechanical engineering from Swarthmore College and in

history from Rutgers, I hold a Rutgers masters degree in history and a Rutgers Ph.D. in political science.

2. The Bureau of Government Research has three principal functions: to conduct research on problems of state and local government in New Jersey, to develop and to conduct training programs for local government officials in New Jersey, and to provide technical assistance to state agencies and officers, as well as to those members of the public interested in the problems of government. In the pursuit of these activities, both I and the Bureau of Government Research have been involved in the problems of congressional redistricting for more than twenty years.

3. When the results of the 1980 decennial census became available in 1981, it was apparent that New Jersey would lose one seat in Congress. Since the number of congressional districts would have to be reduced from 15 to 14 to accommodate the census results, it was clear that the Legislature would be required to enact a congressional redistricting plan. During the early part of the summer of 1981, therefore, I developed a model congressional redistricting plan based on the 1980 census. Through my work in redistricting over the last 20 years, I was familiar with the applicable principles of law and the criteria which this Court enunciated in *David v. Cahill*. I prepared the model redistricting proposal with these principles and criteria in mind, in order to best effectuate the Supreme Court's command that absolute population equality be achieved.

4. My proposal, which is attached hereto as Exhibit A, was completed on July 31, 1981. On August 7, 1981, I sent copies of the proposal to the following persons:

> Governor Brendan T. Byrne, the Republican gubernatorial candidate, Thomas H. Kean, the entire New Jersey congressional delegation, the Republican and Democratic leadership of the Senate (Senators Mer-

lino, Feldman, Orechio, Hirkala, Maressa, Skevin, Parker, Wallwork, Vreeland and Ewing) and of the Assembly (Assemblymen Jackman, Deverin, Karcher, Brown, Doyle, Schuck, McManimon, Visotcky, Hurley, Gallo, Kavanaugh, Edwards, Saxton and Assemblywoman Muhler), and to the Legislature's partisan staff (Jeffrey Laurenti, Lewis Thurston, Richard Coffee and Joseph Gonzales).

5. On August 11, 1981, I sent a copy of my proposal to all other members of the Legislature.

6. The only written response to my plan which I received from any legislator was a five-page letter from Speaker Christopher J. Jackman dated August 28, 1981. The letter, which is attached as Exhibit B, is on Speaker Jackman's official assembly stationery and indicates that copies were forwarded to Governor Byrne and to all Democratic legislators and Democratic Members of Congress. The only oral responses I received were from several legislators who simply acknowledged receipt of my plan.

7. My original plan created fourteen Congressional districts with an overall absolute range of deviation of 1,710 people, and an overall relative range of deviation of 0.325%. By contrast, P.L. 1982, c.1, the plan ultimately adopted by the Legislature, has an overall absolute range of deviation of 3,674 people, and an overall relative range of deviation of 0.6984%. My plan, with minor changes in two districts which did not affect the range of deviation, was proposed for introduction by Assemblyman Hardwicke as A-3817 on January 11, 1981. In addition to having been available to the Legislature as early as August 1981, therefore, my plan was thus also available in bill form more than one week before the enactment of P.L. 1982, c.1.

8. On October 30, 1981, the Bureau of the Census announced that it had discovered an error in the census

of East Orange. This adjustment increased the population of East Orange by 665 people. When this change is taken into account, the overall absolute range of deviation in my plan increases to 2,375 people, and the relative range to 0.451%—still less deviation than the present law. Moreover, the increase made it possible to redraw certain district lines in my plan to achieve an even smaller deviation than in my original plan. To demonstrate this fact, I prepared an addendum to my original plan to take this change into account on February 16, 1982. My addendum, which is attached as Exhibit C, reduces the overall absolute and relative ranges of deviation from my original plan. The overall absolute range is reduced from 1,710 to 1,556 people, and the overall relative range is reduced from 0.325% to 0.296%.

9. I prepared my redistricting plan in such a way as to satisfy the constitutional standard established by the United States Supreme Court: population equality among districts. As I have shown, my plan was available to the Legislature at the time the present law was enacted and achieves greater population equality among the fourteen districts than does the present law.

10. Moreover, in *David v. Cahill* this Court recognized a number of criteria which it considered relevant to its determination of what plan it would adopt. Although these considerations will become pertinent in the present case only in the event that the Legislature fails to enact a constitutional plan after the present law is declared unconstitutional, objective examination of them reveals that my plan achieves greater success on every criterion on which it and the present law differ.

11. One example is the minimization of the number of incumbent Members of Congress who are placed in districts with other incumbents. In order to effect the reduction from 15 to 14 seats, at least two Members of Congress must be placed in the same district. My plan,

therefore, places only the minimum two incumbent Members in the same district. In order to be fair, I chose the two freshmen Members from different parties with adjacent districts: Congressmen Smith (R) and Dwyer (D). P.L. 1982, c.1, by contrast, places six incumbents in districts with other incumbents. Because of the recognized power of incumbency to elect a particular incumbent even when his or her district is predominantly composed of members of the other political party, the effect of the present law's unnecessary pairing of incumbents is artificially to dislocate and alter the political orientation of New Jersey's congressional delegation.

12. My plan also minimizes the number of times that New Jersey's 21 counties are fragmented by the congressional districting plan. A county fragment is created each time a congressional district includes only a portion of a particular county. My plan divides the 21 counties into only 45 fragments, while the present law divides them into 55 fragments.

13. Attached hereto as Exhibit D is a map illustrating the districts created by my original plan. Since the East Orange population increase required changes in certain districts, I have attached as Exhibit E a revised map for northern New Jersey which reflects these changes.

/s/ Ernest C. Reock, Jr.
ERNEST C. REOCK, JR.

[Notarization Omitted in Printing]

Exhibit A

[SEAL] July 31, 1981
RUTGERS
The State University
of New Jersey

A PROPOSAL FOR CONGRESSIONAL DISTRICTS IN NEW JERSEY

Ernest C. Reock, Jr.
Bureau of Government Research
RUTGERS, The State University of New Jersey

The fifteen Congressional Districts used in New Jersey during the 1970's were established by a Federal District Court order pursuant to William David, et al. v. William T. Cahill, 342 *Fed. Supp.* 463, decided April 12, 1972 (See Map 1). While the districts came very close to having precisely equal populations according to the 1970 Census, varying growth patterns since that time have made them very unequal in population. Areas of North Jersey have lost population, while some sections of South Jersey and northwestern New Jersey have had rapid growth. Table 1 shows the 1970 and 1980 populations of the present 15 districts. It is obvious that substantial changes would have to be made to bring the districts again into an acceptable pattern of population equality even if the number of districts were to remain unchanged.

However, the number will not remain unchanged. New Jersey's population grew during the 1970's at a rate substantially below the national growth rate, with the result that the number of seats in the House of Representatives assigned to the state has been reduced from 15 to 14. If action is not taken to re-draw New Jersey's Congressional Districts in time for the 1982 elections, the entire state delegation must be elected at large according to Federal statutes.

The courts generally have required a greater degree of population equality among Congressional Districts than

MAP 1
EXISTING
CONGRESSIONAL DISTRICTS
1981

for State legislative districts, where up to a 10% variation between districts has been considered acceptable. The Federal District Court in David v. Cahill indicated that minimum population deviations among districts is of paramount importance, and the plan ordered into effect did achieve a high degree of population equality (See Table 1). The difference in 1970 population between the largest Congressional District and the smallest was only 812 persons, or 0.17% of the average district population of 478,074. The average relative deviation of all

Table 1. Existing Congressional Districts in New Jersey; Population 1970 and 1980.

Congressional District	1970 Population	Relative Deviation [1]	1980 Population	Relative Deviation [1]
1	478,002	−.015%	524,125	+ 6.759%
2	478,126	+.011	610,529	+ 24.359
3	478,069	−.001	535,439	+ 9.064
4	478,221	+.031	478,290	− 2.577
5	477,789	−.060	473,351	− 3.583
6	478,109	−.007	572,112	+ 16.533
7	478,157	+.017	447,619	− 8.824
8	478,444	+.077	462,340	− 5.826
9	478,098	+.005	459,966	− 6.310
10	477,730	−.072	426,370	− 13.153
11	478,542	+.098	449,556	− 8.430
12	477,887	−.039	443,033	− 9.759
13	478,245	+.036	577,078	+ 17.545
14	477,744	−.069	428,399	− 12.739
15	477,949	−.026	475,951	− 3.054
Total	7,171,112	.564%	7,364,158	148.515%
Average	478,074	.038%	490,944	9.901%
Range [2]	812	.170%	184,159	37.511%

[1] The relative deviation of a district is the percentage by which the population of the district differs from the average district population.

[2] The range of deviations is the difference between the largest and smallest district populations. The range of relative deviations is the absolute range divided by the average district population and expressed as a percentage.

Congressional Districts was only 0.038%.[1] Subsequently, the U.S. Supreme Court, in White v. Weiser, 412 *U.S.* 783 (1973), directed Texas to use a redistricting plan having a range of deviation of 0.149%, rather than a competing plan with a 0.284% range.

In ordering use of the present districts, the Federal District Court listed several other features of a redistricting plan as appropriate, including:

(1) contiguous territory;

(2) compact territory;

(3) preservation of whole municipalities within districts;

(4) minimum fragmentation of counties;

(5) recognition of population increases in new communities and decreases in older communities; and

(6) use of the last legislative determination as the starting point for the new districts.

Presumably, all of these factors constituted justification for some slight variations in population, since the court passed over a competing plan which reduced the range between the largest and smallest districts to only 15 persons (0.003%). In the court's view, the plan put into effect provided the best balance of all appropriate criteria. This plan, in fact, met the court's own criteria in varying degree:

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[1] Actually, the court thought that it was ordering an even more precise plan into effect. The "corrected" 1970 census data then available indicated districts having a population difference of only 714 persons (.149%) between the largest and smallest districts and an average relative deviation of 0.029%. Subsequently, the "revised" 1970 census figures shown in Table 1 were issued with a small effect on district population equality.

Contiguous Territory

All of the Congressional Districts were formed of contiguous territory[1]—but some just barely. The Sixth District and, to a lesser extent, the Fourth District, come close to including non-contiguous areas.

Compact Boundaries

Several districts appeared to be a long way from being compact. Table 2 shows the degree of compactness by one measure—the area of the district expressed as a percentage of the smallest possible circumscribing circle.[2] Two districts, the Fourth and Sixth, fell below 25% in degree of compactness, while seven districts were below 30%.

Whole Municipalities

No municipalities were divided.[3]

Minimum Fragmentation of Counties

The state's 21 counties were divided into 42 pieces by Congressional District lines.[3]

Recognition of Population Increases and Decreases

The court indicated that this criterion was met in the approved plan, since the number of Congressional seats assigned to Bergen, Hudson, and Essex Counties—which

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[1] With the exception of an uninhabited and detached section of South Hackensack.

[2] For a discussion of this measure of compactness, see *Midwest Journal of Political Science*, Vol. V, No. 1, February, 1961.

[3] The preservation of subdivision boundaries as a justification for variations in Congressional District population is called into question by the U.S. Supreme Court in White v. Weiser. Nevertheless, the court did allow to stand in that case a Texas redistricting plan having a range of deviation of 0.149%, a figure which presumably could have been reduced by further fragmenting of local governmental units.

had gained little population—was reduced from six to five. Actually, the criterion becomes redundant if strict population equality is required among the Congressional Districts.

Use of the Last Legislative Determination of Districts as a Starting Point

The court interpreted this criterion to mean that, where possible, new Congressional Districts should disturb existing constituencies as little as possible. Here the court felt that the plan ordered into effect did meet this criterion, although no population data were reported, and a dissenting judge had a different opinion.

Table 2. Degree of Compactness of Existing Congressional Districts in New Jersey; Measured by Area of District as Percentage of Smallest Possible Circumscribing Circle

Congressional District	Area of District	Area of Smallest Circumscribing Circle [1]	Degree of Compactness
1	508	1,099	46%
2	2,355	6,362	37
3	444	887	50
4	441	1,810	24
5	518	1,795	29
6	623	2,679	23
7	146	408	36
8	189	670	28
9	95	346	27
10	31	87	36
11	85	241	35
12	89	243	37
13	1,724	4,754	36
14	33	131	25
15	207	745	28
Mean Average [2]			33%

[1] In square miles.

[2] The mean average is the sum of the individual district degrees of compactness, divided by the number of districts.

The fact that only two incumbent Congressmen were placed in the same new district was taken by the court as evidence that the new districts did preserve existing constituencies to a high degree.[1]

Proposed Districts

The main purpose of this research paper is to propose a set of Congressional Districts which is as fair and non-partisan as possible. The drawing of district lines is a responsibility of the State Legislature and the Governor. Obviously, both political parties have an intense interest in how the districts are drawn, and both parties will attempt to maximize the advantages for their own candidates. However, provisions for a fair and neutral representative process are of such importance in a democracy that the task should not be left solely to the political parties. It is hoped that the presentation of a neutral plan will provide a fair alternative and, possibly, a standard against which other plans may be measured. It is also hoped that this plan is truly fair and non-partisan.

Consolidation of Existing Districts

Probably the most sensitive decision in the 1981 districting process is due to the necessity of reducing the number of districts from 14 to 15. Assuming that an attempt should be made to preserve the existing pattern of Congressional Districts so far as possible, which two of the present districts should be consolidated? Which two of the incumbents should be placed together in a single future district? It is to be expected that most partisan districting plans will deal with these questions in a partisan manner, placing two incumbents of the opposite party in the same district if at all possible. On

[1] In White v. Weiser, the U.S. Supreme Court indicated that preservation of incumbents within their Congressional Districts did not constitute an invidious objective which would disqualify a districting plan, but the court stopped short of endorsing this objective as a desirable attribute of a plan.

the other hand, a plan which is intended as neutral must take the opposite approach. *If the plan is to be truly neutral, it must achieve the reduction from 15 to 14 districts by including in a single district one incumbent of each party.*

The question then arises, which pair of adjacent districts having Republican and Democratic incumbents should be consolidated? The existing 15 districts present 17 possible combinations of adjacent Republican-Democratic incumbents. One approach would be to select the pair of districts having the smallest 1980 combined population. Other alternatives might be to examine the existing districts for compactness or for the degree to which they fragment counties, selecting the pair of districts which fall farthest below some desirable standard by these criteria as the pair to be consolidated. A third approach might be to concentrate on the incumbents, selecting the pair of districts having incumbents with the least seniority. No single, completely unassailable criterion is apparent; any decision inevitably will result in damage to some interests and will be subject to criticism. Nevertheless, some decision must be made.

The decision as to which pair of districts to consolidate varies, depending on the criterion used. However, the first three criteria suggested—1980 population of the districts, degree of compactness, and fragmentation of counties—all relate to the existing districts, and all presumably will be changed in the districting process. It seems appropriate, therefore, to base the plan on the criterion which will carry over into the new districts and which will have an impact on the future representation of New Jersey in Congress—seniority of the incumbents. If seniority is most important, the choice is clear. The Fourth District and the Fifteenth District both are represented by freshman members of the House of Representatives, Christopher Smith and Bernard Dwyer. No other pair of districts comes close to this low level of seniority. This proposed districting plan, therefore, has

been built around a consolidation of the Fourth and Fifteenth Districts in order to reduce the total number of districts from 15 to 14. The consolidated district will be called the Fourth District.

The 14 proposed Congressional Districts are shown on May 2, and a listing of the communities included in each is contained in the Appendix. An effort has been made to meet the criteria used by the Federal District Court in David v. Cahill.

Population Equality

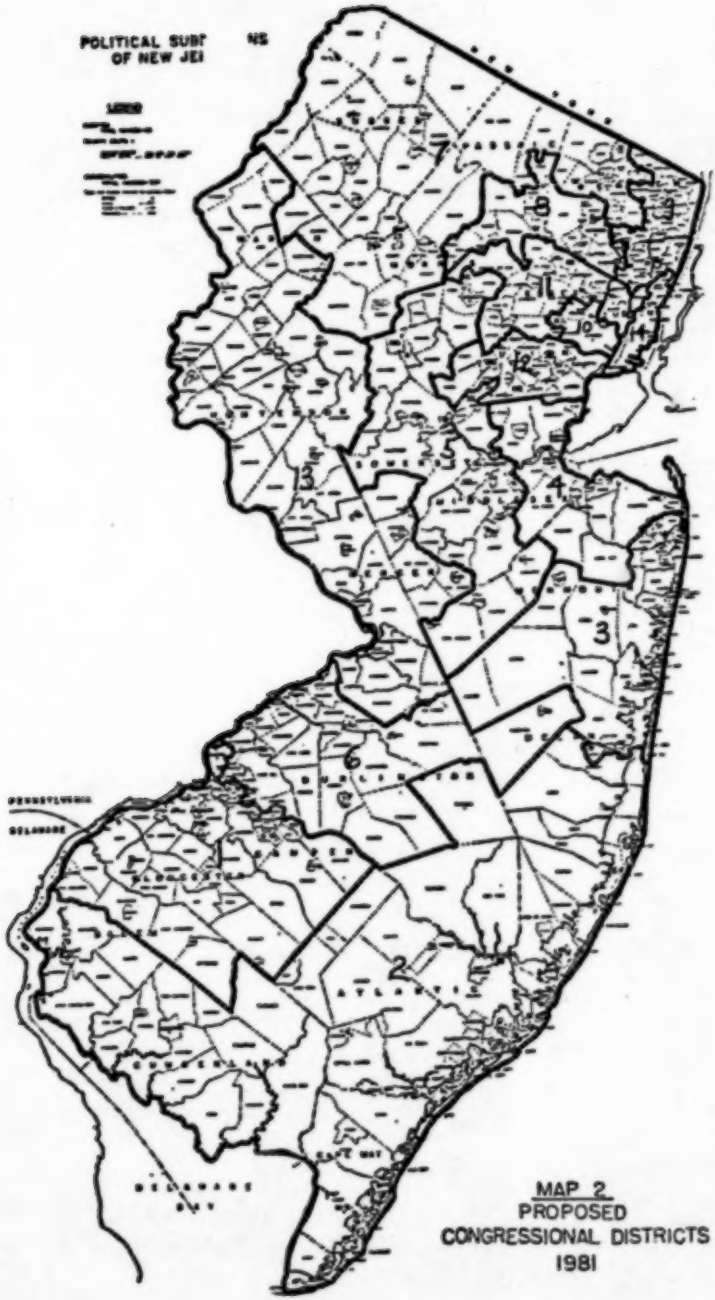
The populations of the proposed districts are shown in Table 3. The range of population from the smallest dis-

Table 3. Proposed Congressional District Plan for 14 Districts Using 1980 Population

Proposed Congressional District	1980 Population	Relative Deviation [1]
1	525,784	−.043%
2	525,915	−.018
3	525,794	−.041
4	525,788	−.042
5	526,182	+.032
6	526,054	+.008
7	526,283	+.052
8	526,337	+.062
9	525,726	−.054
10	527,008	+.189
11	525,298	−.136
12	526,464	+.086
13	526,189	+.034
14	525,336	−.128
Total	7,364,158	.925%
Average	526,011	.066%
Range [2]	1,710	.325%

[1] The relative deviation of a district is the percentage by which the population of the district differs from the average district population.

[2] The range of deviations is the difference between the largest and smallest district populations. The range of relative deviations is the absolute range divided by the average district population and expressed as a percentage.



MAP 2
PROPOSED
CONGRESSIONAL DISTRICTS
1981

trict to the largest is 1,710 persons, or 0.325%. This is a greater variation than in the 1972 plan, when the range was 812 persons, or 0.170%. It may be noted, however, that the largest and smallest proposed districts are the adjacent Tenth and Eleventh Districts. While they might possibly be re-drawn to achieve slightly more equal population figures, this almost certainly would result either in splitting the Black community in Essex County or in splitting municipalities. The Tenth District, as proposed, has a population which is 57% Black. If these two districts are omitted, the range of deviation drops to 1,128 or 0.214%.

Contiguous-Territory

All proposed districts are formed of contiguous territory.

Compact Boundaries

If the standard of the smallest possible circumscribing circle is used to measure compactness, the proposed new districts are at least comparable to the existing districts (See Table 4). Again, two districts fall below a 25% degree of compactness but only three, instead of seven, are below 30%. Moreover, the average degree of compactness is improved from 33% to 36%. The major weakness is the Fourteenth District which stretches along the Hudson County waterfront and achieves only a 17% degree of compactness.

Whole Municipalities

No municipalities are divided in this plan.

Minimum Fragmentation of Counties

Here there is a less satisfactory solution than in 1972, with the state's 21 counties being divided into 45 segments instead of 42.

Recognition of Population Increases and Decreases

This is a redundant criterion if population equality is attained. It may be noted, however, that the proposed South Jersey districts, where most of the state's growth is taking place, are all slightly below the average population size, although the deviations are so small as to be relatively insignificant.

Use of the Last Legislative Determination of Districts as a Starting Point

The proposed districts were constructed in precisely this way, beginning with the 15 existing districts, settling upon the consolidation of two of them, and then adding or subtracting municipalities until a satisfactory popula-

Table 4. Degree of Compactness of Proposed Congressional Districting Plan for 14 Districts; Measured by Area of District as Percentage of Area of Smallest Possible Circumscribing Circle

Proposed Congressional District	Area of District [1]	Area of Smallest Circumscribing Circle [1]	Degree of Compactness
1	656	1,344	49%
2	2,102	6,487	32%
3	459	1,237	37%
4	271	726	37%
5	622	2,256	28%
6	567	1,768	32%
7	1,036	2,098	49%
8	162	471	34%
9	115	314	37%
10	37	65	57%
11	170	554	31%
12	141	423	33%
13	1,118	4,681	24%
14	32	193	17%
Mean Average [2]			36%

[1] In square miles.

[2] The mean average is the sum of the individual district degrees of compactness, divided by the number of districts.

tion was reached. With the exception of Congressman Dwyer and Smith, no incumbent members of Congress are placed in direct competition in a proposed district. Moreover, the political complexion of the districts continues to be reflected by the party affiliation of the incumbents.

Political Orientation of the Proposed Districts

A test of the political orientation of the proposed districts is somewhat involved because of the substantial "incumbency factor" in Congressional elections. Incumbent members of Congress frequently are able to gain re-election in districts which otherwise appear oriented toward the opposite party. Thus, the votes cast in past elections for an incumbent in such an area may not be transferable to some other candidate of the same party who acquires that area in the re-districting process. In order to evaluate the political orientation of the new districts, the 1980 votes cast for each incumbent have been counted *only for those areas which that incumbent would retain* under the proposed districting plan. For new areas added to an incumbent's district, the average votes for party candidates in the 1979 election for General Assembly have been used as a better measure of the political orientation of communities involved. In this way it is hoped that the estimates will be adjusted for the "incumbency factor". The results are shown in Table 5. In every case, the incumbent retains a majority of the estimated party votes, although sometimes by a reduced margin. The proposed Fourth District, including incumbents from both parties, appears to be a highly competitive district, with a 50.9% margin for the Democrats. Over-all, more than two-thirds of the 1980 voters of the state are continued in their present Congressional Districts under the proposed plan.

As a rough test of the fairness of the proposed districting plan, the votes shown in Table 5 can be analyzed

Table 5. Political Analysis of Proposed Congressional Districts

Districts and Incumbents	Political Orientation of District	Democratic	Republican	Total	Percentage Carried Over
1 Florio (D)	Carry-Over Votes	138,255 (78.6%)	37,563 (21.4%)	175,818	93.7%
	Est. New Votes	7,292 (61.7%)	4,527 (38.3%)	11,819	
	Est. Total Votes	145,547 (77.6%)	42,090 (22.4%)	187,637	
2 Hughes (D)	Carry-Over Votes	117,506 (60.2%)	77,651 (39.8%)	195,157	100.0%
	Est. New Votes	- -	- -	-	
	Est. Total Votes	117,506 (60.2%)	77,651 (39.8%)	195,157	
3 Howard (D)	Carry-Over Votes	71,993 (52.0%)	66,564 (48.0%)	138,557	68.2%
	Est. New Votes	33,962 (52.5%)	30,727 (47.5%)	64,689	
	Est. Total Votes	105,955 (52.1%)	97,291 (47.9%)	203,246	
4 Smith(R) Dwyer(D)	Carry-Over Votes				
	From C.D. 4	9,745 (38.9%)	15,317 (61.1%)	25,062	12.8%
	From C.D.15	58,446 (53.5%)	50,820 (46.5%)	109,266	55.6%
	Est. New Votes	31,789 (51.1%)	30,420 (48.9%)	62,209	
	Est. Total Votes	99,980 (50.9%)	96,557 (49.1%)	196,537	
5 Fenwick (R)	Carry-Over Votes	24,433 (22.7%)	83,080 (77.3%)	107,513	54.2%
	Est. New Votes	55,524 (61.0%)	35,499 (39.0%)	91,023	
	Est. Total Votes	79,957 (40.3%)	118,579 (59.7%)	198,536	
6 Forsythe (R)	Carry-Over Votes	68,377 (43.2%)	89,588 (56.7%)	157,965	78.9%
	Est. New Votes	19,885 (47.1%)	22,333 (52.9%)	42,218	
	Est. Total Votes	88,262 (44.1%)	111,921 (55.9%)	200,183	
7 Roukema (R)	Carry-Over Votes	46,010 (43.9%)	58,718 (56.1%)	104,728	49.4%
	Est. New Votes	41,848 (38.9%)	65,730 (61.1%)	107,578	
	Est. Total Votes	87,858 (41.4%)	124,448 (58.6%)	212,306	
8 Roe (D)	Carry-Over Votes	86,905 (69.2%)	38,644 (30.8%)	125,549	74.9%
	Est. New Votes	16,664 (39.6%)	25,417 (60.4%)	42,081	
	Est. Total Votes	103,569 (61.4%)	64,061 (38.2%)	167,630	
9 Hollenbeck (R)	Carry-Over Votes	48,668 (37.1%)	82,470 (62.9%)	131,138	55.8%
	Est. New Votes	49,705 (47.9%)	54,064 (52.1%)	103,769	
	Est. Total Votes	98,373 (41.9%)	136,534 (58.1%)	234,907	
10 Rodino (D)	Carry-Over Votes	73,922 (87.7%)	10,360 (12.3%)	84,282	75.1%
	Est. New Votes	17,739 (63.4%)	10,240 (36.6%)	27,979	
	Est. Total Votes	91,661 (81.6%)	20,600 (18.4%)	112,261	
11 Minish (D)	Carry-Over Votes	74,848 (62.7%)	44,606 (37.3%)	119,454	55.6%
	Est. New Votes	38,926 (40.8%)	56,480 (59.2%)	95,406	
	Est. Total Votes	113,774 (53.0%)	101,086 (47.0%)	214,860	
12 Rinaldo (R)	Carry-Over Votes	36,543 (21.3%)	134,889 (78.7%)	171,432	84.1%
	Est. New Votes	13,578 (41.8%)	18,905 (58.2%)	32,483	
	Est. Total Votes	50,121 (24.6%)	153,794 (75.4%)	203,915	
13 Courter (R)	Carry-Over Votes	23,721 (29.1%)	57,777 (70.9%)	81,498	42.8%
	Est. New Votes	64,679 (59.5%)	44,025 (40.5%)	108,704	
	Est. Total Votes	88,400 (46.5%)	101,802 (53.5%)	190,202	
14 Guarini (D)	Carry-Over Votes	80,108 (67.0%)	39,409 (33.0%)	119,517	72.9%
	Est. New Votes	31,471 (70.7%)	13,042 (29.3%)	44,513	
	Est. Total Votes	111,579 (68.0%)	52,451 (32.0%)	164,030	
TOTAL	Carry-Over Votes	959,480	887,456	1,846,936	68.9%
	Est. New Votes	423,063	411,409	834,471	
	Est. Total Votes	1,382,543 (51.6%)	1,298,865 (48.4%)	2,681,408	

in terms of what they would show if the total popular vote split evenly. The state-wide percentage using the combined 1979-1980 election returns, as described above, yields a 51.6% Democratic margin. If 1.6% is subtracted from the Democratic percentage in every district, to approximate an even split of the total popular vote, the result is a seven to seven decision of the Congressional District results. On this basis, it appears that the proposed plan is fair to both political parties, as well as providing districts which are nearly equal in population, are formed of contiguous territory, are reasonably compact, do not split municipalities, do not fragment counties unduly, and carry over most of the state's voters in their present Congressional Districts.

Appendix

Proposed Congressional Districts

Proposed District 1

Camden County		
Audubon Borough	9,533	
Barrington Borough	7,418	
Bellmawr Borough	13,721	
Berlin Borough	5,786	
Berlin Township	5,348	
Brooklawn Borough	2,133	
Camden City	84,910	
Chesilhurst Borough	1,590	
Clementon Borough	5,764	
Gibbsboro Borough	2,510	
Gloucester Township	45,156	
Gloucester City City	13,121	
Haddon Heights Borough	8,361	
Hi-Nella Borough	1,250	
Laurel Springs Borough	2,249	
Lindenwold Borough	18,196	
Mount Ephaim Borough	4,863	
Pine Hill Borough	8,684	
Pine Valley Borough	23	
Runnemede Borough	9,461	
Somerdale Borough	5,900	
Stratford Borough	8,005	
Waterford Township	8,126	
Winslow Township	20,034	
	292,142	292,142
Gloucester County	199,917	199,917
Salem County		
Carneys Point Township	8,396	
Elmer Borough	1,569	
Oldmans Township	1,847	
Penns Grove Borough	5,760	
Pilesgrove Township	2,810	
Pittsgrove Township	6,954	
Upper Pittsgrove Township	3,139	
Woodstown Borough	3,250	
	33,725	33,725
		525,784

Proposed District 2		
Atlantic County	194,119	194,119
Burlington County		
Bass River Township	1,344	
Washington Township	808	
Woodland Township	2,285	
	4,437	4,437
Cape May County	82,266	82,266
Cumberland County	132,866	132,866
Ocean County		
Barnegat Township	8,702	
Barnegat Light Borough	619	
Beach Haven Borough	1,714	
Berkeley Township	23,151	
Eagleswood Township	1,009	
Harvey Cedars Borough	363	
Lacey Township	14,161	
Little Egg Harbor Township	8,483	
Long Beach Township	3,488	
Ocean Township	3,731	
Ship Bottom Borough	1,427	
Stafford Township	10,385	
Surf City Borough	1,571	
Tuckerton Borough	2,472	
	81,276	81,276
Salem County		
Alloway Township	2,680	
Elsinboro Township	1,290	
Lower Alloway Creek Township	1,547	
Mannington Township	1,740	
Pennsville Township	13,848	
Quinton Township	2,887	
Salem City	6,959	
	30,951	30,951
		525,915
Proposed District 3		
Monmouth County		
Allenhurst Borough	912	
Asbury Park City	17,015	
Avon-by-the-Sea Borough	2,337	
Belmar Borough	6,771	
Bradley Beach Borough	4,772	
Brielle Borough	4,068	
Deal Borough	1,952	

Eatontown Borough	12,703	
Fair Haven Borough	5,679	
Farmingdale Borough	1,348	
Freehold Borough	10,020	
Freehold Township	19,202	
Howell Township	25,065	
Interlaken Borough	1,037	
Little Silver Borough	5,548	
Loch Arbour Village	369	
Long Branch City	29,819	
Manasquan Borough	5,354	
Monmouth Beach Borough	3,318	
Neptune Township	28,366	
Neptune City Borough	5,276	
Ocean Township	23,570	
Oceanport Borough	5,888	
Red Bank Borough	12,031	
Rumson Borough	7,623	
Sea Girt Borough	2,650	
Shrewsbury Borough	2,962	
Shrewsbury Township	995	
South Belmar Borough	1,566	
Spring Lake Borough	4,215	
Spring Lake Heights Borough	5,424	
Tinton Falls Borough	7,740	
Wall Township	18,952	
West Long Branch Borough	7,380	
	291,927	291,927
Ocean County		
Bay Head Borough	1,340	
Beachwood Borough	7,687	
Brick Township	53,629	
Dover Township	64,455	
Island Heights Borough	1,575	
Jackson Townhsip	25,644	
Lakewood Township	38,464	
Lavallette Borough	2,072	
Mantoloking Borough	433	
Ocean Gate Borough	1,385	
Pine Beach Borough	1,796	
Plumsted Township	4,674	
Point Pleasant Borough	17,747	
Point Pleasant Beach Borough	5,415	
Seaside Heights Borough	1,802	
Seaside Park Borough	1,795	
South Toms River Borough	3,954	
	233,867	233,867
		525,794

Proposed District 4

Middlesex County		
Carteret Borough	20,598	
Edison Township	70,193	
Metuchen Borough	13,762	
Old Bridge Township	51,515	
Perth Amboy City	38,951	
Sayreville Borough	29,969	
South Amboy City	8,322	
South Plainfield Borough	20,521	
Woodbridge Township	90,074	
	343,905	343,905
Monmouth County		
Aberdeen Township	17,235	
Atlantic Highlands Borough	4,950	
Colts Neck Township	7,888	
Hazlet Township	23,013	
Highlands Borough	5,187	
Holmdel Township	8,447	
Keansburg Borough	10,613	
Keyport Borough	7,413	
Marlboro Township	17,560	
Matawan Borough	8,837	
Middletown Township	62,574	
Sea Bright Borough	1,812	
Union Beach Borough	6,354	
	181,883	181,883
		525,788

Proposed District 5

Middlesex County		
Cranbury Township	1,927	
Dunellen Borough	6,593	
East Brunswick Township	37,711	
Helmetta Borough	955	
Highland Park Borough	13,396	
Jamesburg Borough	4,114	
Middlesex Borough	13,480	
Milltown Borough	7,136	
Monroe Township	15,858	
New Brunswick City	41,442	
North Brunswick Township	22,220	
Piscataway Township	42,223	
Plainsboro Township	5,605	
South Brunswick Township	17,127	
South River Borough	14,361	
Spotswood Borough	7,840	
	251,988	251,988

Monmouth County		
Allentown Borough	1,962	
Englishtown Borough	976	
Manalapan Township	18,914	
Millstone Township	3,926	
Roosevelt Borough	835	
Upper Freehold Township	2,750	
	29,363	29,363
Morris County		
Hanover Township	11,846	
Harding Township	3,236	
Mendham Borough	4,899	
Mendham Township	4,488	
Morris Township	18,486	
Morris Plains Borough	5,305	
Morristown Town	16,614	
	64,874	64,874
Somerset County		
Bedminster Township	2,469	
Bernards Township	12,920	
Bernardsville Borough	6,715	
Bound Brook Borough	9,710	
Branchburg Township	7,846	
Bridgewater Township	29,175	
Far Hills Borough	677	
Franklin Township	31,358	
Green Brook Township	4,640	
Hillsborough Township	19,061	
Manville Borough	11,278	
Millstone Borough	530	
North Plainfield Borough	19,108	
Peapack and Gladstone Borough	2,038	
Raritan Borough	6,128	
Somerville Borough	11,973	
South Bound Brook Borough	4,331	
	179,957	179,957
		526,182

Proposed District 6

Burlington County		
Beverly City	2,919	
Burlington City	10,246	
Burlington Township	11,527	
Cinnaminson Township	16,072	
Delanco Township	3,730	
Delran Township	14,811	
Eastampton Township	3,814	
Edgewater Park Township	9,273	
Evesham Township	21,659	
Hainesport Township	3,236	
Lumberton Township	5,236	
Maple Shade Township	20,525	
Medford Township	17,471	
Medford Lakes Borough	4,958	
Moorestown Township	15,596	
Mount Holly Township	10,818	
Mount Laural Township	17,614	
New Hanover Township	14,258	
Palmyra Borough	7,085	
Pemberton Borough	1,198	
Pemberton Township	29,720	
Riverside Township	7,941	
Riverton Borough	3,068	
Shamong Township	4,537	
Southampton Township	8,808	
Tabernacle Township	6,236	
Westampton Township	3,383	
Willingboro Township	39,912	
	315,651	315,651
Camden County		
Audubon Park Borough	1,274	
Cherry Hill Township	68,785	
Collingswood Borough	15,838	
Haddon Township	15,875	
Haddonfield Borough	12,337	
Lawnside Borough	3,042	
Magnolia Borough	4,881	
Merchantville Borough	3,972	
Oaklyn Borough	4,223	
Pennsauken Township	33,775	
Tavistock Borough	9	
Voorhees Township	12,919	
Woodlynne Borough	2,578	
	179,508	179,508

Ocean County		
Lakehurst Borough	2,908	
Manchester Township	27,987	
	30,895	30,895
		526,054

Proposed District 7

Bergen County		
Allendale Borough	5,901	
Fair Lawn Borough	32,229	
Franklin Lakes Borough	8,769	
Glen Rock Borough	11,497	
Hillsdale Borough	10,495	
Ho-ho-kus Borough	4,129	
Mahwah Township	12,127	
Midland Park Borough	7,381	
Oakland Borough	13,443	
Paramus Borough	26,474	
Ramsey Borough	12,899	
Ridgewood Village	25,208	
Saddle River Borough	2,763	
Upper Saddle River Borough	7,958	
Waldick Borough	10,802	
Woodcliff Lake Borough	5,644	
Wyckoff Township	15,500	
	213,219	213,219
Morris County		
Butler Borough	7,616	
Chester Borough	1,433	
Chester Township	5,198	
Dover Town	14,681	
Jefferson Township	16,413	
Mine Hill Township	3,325	
Mount Arlington Borough	4,251	
Mount Olive Township	18,748	
Netcong Borough	3,557	
Randolph Township	17,828	
Rockaway Township	19,850	
Roxbury Township	18,878	
Victory Gardens Borough	1,043	
Washington Township	11,402	
Wharton Borough	5,485	
	149,708	149,708

Passaic County		
Bloomingdale County	7,867	
Ringwood Borough	12,625	
West Milford Township	22,750	
	43,242	43,242
Sussex County	116,119	116,119
Warren County		
Allamuchy Township	2,560	
Frelinghuysen Township	1,435	
	3,995	3,995
		526,283
Proposed District 8		
Bergen County		
Garfield City	26,803	
Wallington Borough	10,741	
	37,544	37,544
Morris County		
Boonton Town	8,620	
Boonton Township	3,273	
Denville Township	14,380	
Kinnelon Borough	7,770	
Lincoln Park Borough	8,806	
Montville Township	14,290	
Mountain Lakes Borough	4,153	
Pequannock Township	13,776	
Riverdale Borough	2,530	
Rockaway Borough	6,852	
	84,450	84,450
Passaic County		
Clifton City	74,388	
Haledon Borough	6,607	
Hawthorne Borough	18,200	
Little Falls Township	11,496	
North Haledon Borough	8,177	
Passaic City	52,463	
Paterson City	137,970	
Pompton Lakes Borough	10,660	
Prospect Park Borough	5,142	
Totowa Borough	11,448	
Wanaque Borough	10,025	
Wayne Township	46,474	
West Paterson Borough	11,293	
	404,343	404,343
		526,337

Proposed District 9

Bergen County		
Alpine Borough	1,549	
Bergenfield Borough	25,568	
Bogota Borough	8,344	
Carlstadt Borough	6,166	
Closter Borough	8,164	
Cresskill Borough	7,609	
Demarest Borough	4,963	
Dumont Borough	18,334	
East Rutherford Borough	7,849	
Edgewater Borough	4,628	
Elmwood Park Borough	18,377	
Emerson Borough	7,793	
Englewood City	23,701	
Englewood Cliffs Borough	5,698	
Fort Lee Borough	32,449	
Hackensack City	36,439	
Harrington Park Borough	4,532	
Hasbrouck Heights Borough	12,166	
Haworth Borough	3,509	
Leonia Borough	8,027	
Little Ferry Borough	9,399	
Lodi Borough	23,956	
Maywood Borough	9,895	
Montvale Borough	7,318	
Moonachie Borough	2,706	
New Milford Borough	16,876	
Northvale Borough	5,046	
Norwood Borough	4,413	
Old Tappan Borough	4,168	
Oradell Borough	8,658	
Palisades Park Borough	13,732	
Park Ridge Borough	8,515	
Ridgefield Borough	10,294	
Ridgefield Park Village	12,738	
River Edge Borough	11,111	
River Vale Township	9,489	
Rochelle Park Township	5,603	
Rockleigh Borough	192	
Rutherford Borough	19,068	
Saddle Brook Township	14,084	
South Hackensack Township	2,229	
Teaneck Township	39,007	
Tenafly Borough	13,552	
Teterboro Borough	19	
Washington Township	9,550	
Westwood Borough	10,714	
Wood-Ridge Borough	7,929	
	525,726	525,726

Proposed District 10

Essex County		
East Orange City	77,025	
Irvington Town	61,493	
Newark City	329,248	
Orange City	31,136	
South Orange Village Township	15,864	
	514,766	514,766
Hudson County		
Harrison Town	12,242	12,242
		527,008

Proposed District 11

Bergen County		
Lyndhurst Township	20,326	
North Arlington Borough	16,587	
	36,913	36,913
Essex County		
Belleville Town	35,367	
Bloomfield Town	47,792	
Caldwell Borough	7,624	
Cedar Grove Township	12,600	
Essex Fells Borough	2,363	
Fairfield Township	7,987	
Glen Ridge Borough	7,855	
Livingston Township	28,040	
Maplewood Township	22,950	
Millburn Township	19,543	
Montclair Town	38,321	
North Caldwell Borough	5,832	
Nutley Town	28,998	
Roseland Borough	5,330	
Verona Borough	14,166	
West Caldwell Borough	11,407	
West Orange Town	39,510	
	335,685	335,685
Hudson County		
East Newark Borough	1,923	
Kearny Town	35,735	
Secaucus Town	13,719	
	51,377	51,377

Morris County		
Chatham Borough	8,537	
Chatham Township	8,883	
East Hanover Township	9,319	
Florham Park Borough	9,359	
Madison Borough	15,357	
Parsippany-Troy Hills Township	49,868	
	101,323	101,323
		525,298
Proposed District 12		
Morris County		
Passaic Township	7,275	7,275
Somerset County		
Warren Township	9,805	
Watchung Borough	5,290	
	15,095	15,095
Union County	504,094	504,094
		526,464
Proposed District 13		
Burlington County		
Bordentown City	4,441	
Bordentown Township	7,170	
Chesterfield Township	3,867	
Fieldsboro Borough	597	
Florence Township	9,084	
Mansfield Township	2,523	
North Hanover Township	9,050	
Springfield Township	2,691	
Wrightstown Borough	3,031	
	42,454	42,454
Hunterdon County	87,361	87,361
Mercer County	307,863	307,863
Somerset County		
Montgomery Township	7,360	
Rocky Hill Borough	717	
	8,077	8,077

Warren County		
Alpha Borough	2,644	
Belvidere Town	2,475	
Blairstown Township	4,360	
Franklin Township	2,341	
Greenwich Township	1,738	
Hackettstown Town	8,850	
Hardwick Township	947	
Harmony Township	2,592	
Hope Township	1,468	
Independence Township	2,829	
Knowlton Township	2,074	
Liberty Township	1,730	
Lopatcong Township	4,998	
Mansfield Township	5,780	
Oxford Township	1,659	
Pahaquarry Township	26	
Phillipsburg Town	16,647	
Pohatcong Township	3,856	
Washington Borough	6,429	
Washington Township	4,243	
White Township	2,748	
	80,434	80,434
		526,189

Proposed District 14

Bergen County		
Cliffside Park Borough	21,464	
Fairview Borough	10,519	
	31,983	31,983
Hudson County		
Bayonne City	65,047	
Guttenberg Town	7,340	
Hoboken City	42,460	
Jersey City City	223,532	
North Bergen Township	47,019	
Union City City	55,593	
Weehawken Township	13,168	
West New York Town	39,194	
	493,353	493,353
		525,336

Exhibit B

[SEAL]

General Assembly
of New Jersey
Trenton

Speaker

CHRISTOPHER J. JACKMAN
Assemblyman, District 33 (Hudson)
6110 Monitor Place
West New York, N.J. 07093

Res. 201-868-2637
Bus. 201-861-0961
Leg. Off. 201-861-7266

August 28, 1981

Ernest C. Reock, Jr.
Director
Bureau of Government Research
Rutgers University
New Brunswick, New Jersey 08403

Dear Mr. Reock:

I recently received your letter and plan for New Jersey Congressional districts. I want to thank you for the time and effort you put into your paper. As a principle in the process which will decide New Jersey's Congressional boundaries for the next decade, I have taken this opportunity to respond to your report.

After reading your report I am struck by the suggestion that adherence to the criteria in your report will produce one and only one "fair" map. A further suggestion that this single map then serve as the standard against which all other plans be measured seems to me somewhat presumptious. In fact I am certain that no single scientifically developed blueprint can be applied

in the case of Congressional Apportionment. It is clear that a variety of proposed plans and possible approaches must be explored, all of which have merits as being fair.

Political fairness as it applies to Congressional redistricting is an illusive concept which as you know is often used as a smokescreen for partisan political advantage. Redistricting is a process necessarily comprised of many diverse interests and subjective judgments. Just as several doctors evaluating the same patient could offer several differing but valid opinions, so it is true that those who are directly involved in the apportionment process would be ill advised to set out in the preconceived notion that only one opinion or standard should be recognized. To call your redistricting plan "fair" in comparison to all other plans seems little more than an academic shell game.

In addition I am concerned that assertions about fairness and your urging about establishing standards without recognition of the political process may deny the very real political nature of apportionment. Congressional redistricting is a matter taken up by the entire Legislature. Legislators are elected as members of parties. Those legislators and their parties represent communities of interest which bind members together. Political parties serve to form governing coalitions, without which policies would be in total chaos. The strength of the party-system depends on many varied and quite intricate relationships. As such, the issues inherent in apportionment have come to be defined by parties, negotiated by parties and ultimately solved by parties.

The Federal Courts have utilized very definable features in judging the comparative merits of Congressional apportionment plans. You discuss in your paper the requirements for districts that are contiguous and compact, which do not divide municipalities and adhere to county boundaries wherever possible, which recognize shifts in

populations from older to new communities, and which take into account the previous districts which are being changed. You also recognize that these factors are often in competition with each other and that a sense of priority must be attached to these criteria. When two or more criteria are at odds how should decisions be made? Although we must resort to guessing at judicial intentions, it is regrettable that such decision criteria were not included in your report. While you adequately explain that your proposal does meet judicial standards you do not engage in the more technical discussion of why this plan is better than other possible plans. Statements alluding to its superiority are left unsubstantiated.

In addition to the definable and perhaps measurable criteria by which you drew your plan, apportionment is a political process. No apologies need be made for interests which exist and the pressures which bear upon those who are burdened with the decisions of apportionment. Although you are obviously quite well versed in redistricting law and history, your paper is silent on the important role of community-level politics in apportionment decisions. It is perhaps the process within which Congressional redistricting occurs which dictates its outcome. Without changing the prescribed apportionment process in New Jersey and in other states, it is unlikely that your plan has any chance of adoption. With this in mind, as I'm sure you are aware, it is difficult to understand how you expect legislative action to coincide with your views of the "fairest" plan possible. Why, indeed did you concentrate on alternatives for the solution without even mentioning the political process through which it must pass?

With this in mind, it may be useful to examine the redistricting process and the context within which the New Jersey legislative takes up the issue.

Here in New Jersey the Democratic Party has control over the Congressional apportionment process for the

first time ever. This occurs, as you know, because Democrats hold a majority in both houses of the legislature, as well as being represented in the Governor's seat. Ten years ago, and during every Congressional redistricting in New Jersey's history, Republicans played the predominant role. Each time Republicans sought to legislate districts which would maximize their representation in Congress. And each time Republicans drew districts which were intended to improve upon the previous partisan Congressional representation.

Well, an interesting thing happened along the way—as I'm sure you are aware: the Democratic Party became the dominant party in New Jersey; the party considered more representative of the needs and wishes of New Jersey voters. In the last ten years—under a court-ordered adaptation of a Republican plan—Democratic Congressional candidates have overwhelmingly been the choice of the voters. In those years Democrats have never held less than 8 of the 15 Congressional districts and as many 12. Furthermore, Democratic electoral dominance over the past decade can be established by reviewing the party representation amongst the major political offices. Over the period in which the current districts have been in place, Democrats have dominated the State House at all levels, represent the bulk of the Congressional delegation, and now represent both United States Senators.

The political analysis used to justify your plan employs election results from 1979 and 1980 only. It is my estimation that in determining the best plan for Congressional districts—districts that will be in place for the next ten years—election results from the previous ten years should be taken into account. Of course, more recent elections may be given more weight, but not to the total exclusion of other election data. From my point of view, the 1980 election results are not entirely indicative of the state of partisan politics in New Jersey. There is no doubt that the Democratic party under the leadership of Jim Florio, our gubernatorial candidate, will con-

tinue to enjoy great success amongst the voters of New Jersey. Our representatives in Congress should, as closely as possible, parallel the sentiments of New Jersey voters.

It is in fact interesting that you make use of past election data in defining the expected partisan makeup of your plan. As I'm sure you are aware, others who have made suggestions as to the improvements of political fairness in the apportionment process, tend to shun the use of such political information, perhaps exclude it altogether. Nonetheless, since you have reviewed past election data you must surely expect all others involved in the process to do likewise. Given the process by which the Legislature decides upon a plan how can you expect members of the Legislature to ignore election data which would perhaps lead to other Congressional district configurations more beneficial to party members? You in essence are asking Democrats to subjugate their interests and in effect ignore political election results in order to accommodate your opinions on the "ideal" apportionment plan.

Congressional redistricting in New Jersey must also be viewed from the more broad-based national perspective. The Republican party is only 27 votes short of absolute control of Congress. With a shift of population and consequently Congressional seats from the traditionally Democratic urban industrial states to the more Republican dominated sun-belt states the redistricting process is viewed by Republicans as an opportunity to close that 27 vote margin, or perhaps even overcome it entirely. Toward this end the Republican National Committee (RNC) has undertaken a widely publicized and well-financed redistricting program. Their strategy, as the following examples illustrate is to maximize the Republican potential in those states where they control the process and attack the Democrats as politically unfair in those states in which the Democrats are involved.

Indiana is a state where the Republican party holds a majority in both houses of the Legislature as well as

being represented in the Governor's office. A state tailor-made for the RNC strategy, they sent in a team of technical advisors and managed a bill through the Legislature which was later signed into law by the Governor. By packing all the available Democratic population into the three already heavily Democratic districts and dividing the remaining Democratic population amongst several otherwise Republican districts they hope to see the Congressional delegation change dramatically. From a current delegation of 6 Democrats and 5 Republicans the new redistricting plan intends to dump 3 Democrats, thus returning a delegation of 3 Democrats and 7 Republicans to Congress next year. (Indiana like New Jersey loses one seat next year.)

Republicans also saw a great opportunity in Washington State, where they dominate the apportionment process at all levels. Following closely on their tremendous "success" in Indiana, Republicans rammed a redistricting plan through the Legislature in April. The plan intended to change the Congressional delegation from 5 Democrats and 2 Republicans to perhaps only 3 Democrats and 5 Republicans. (Washington gains an additional seat.) Republican Governor Spellman vetoed the plan, however, as too extreme. The next effort will not be made until later this year.

In Colorado the Republicans who control both houses of the Legislature must contend with Democratic Governor Richard Lamm on redistricting. The Republicans have already passed and the Governor has vetoed two plans which are intended to shift the Congressional delegation from the current 3 Democrats and 2 Republicans to 1 Democrat and 5 Republicans. (Colorado gains a seat.) The Republicans have now countered with nearly a half million dollar TV advertising blitz aimed at discrediting Lamm as playing partisan politics—in essence being politically unfair. Without going into great detail over what the Colorado Republicans have in mind you can see that the Democrats are up against heretofore unheard

of tactics in the battleground of Congressional redistricting.

Againt heavy odds, in the person of a popular and powerful President and the fundraising and organizational capability he represents, Democrats are wary of partisan politics. Democrats, even when successful are often on the defensive and appear open to just those media-hyped "fairness" arguments put forth in your work. The fact of the matter is that I feel very strongly that your Congressional redistricting plan is little more than an academic statement of *your* views of the desired outcome. Perhaps unwittingly, you play into Republican strategies quite well. Of course Republican spokesmen will deny any involvement or perhaps interest in your plan. But you can bet that in response to whatever Democrats propose, Republicans will be quick to embrace the "fair" Reock alternative. Political posturing of this nature is expected, but should be taken only for the rhetoric it represents.

Having said all this, I would like to add that in no way do I discourage input such as yours into a very complicated, sometimes unwieldy political process. In fact your expertise has been and I'm sure will continue to be of inordinate value to those of us in New Jersey government. It is a measure with which I take the seriousness of your work that such a lengthy response seems in order.

Once again I thank you for the time and effort you have given the issue of Congressional redistricting in New Jersey.

Sincerely,

/s/ Christopher J. Jackman
CHRISTOPHER J. JACKMAN
Speaker

gm

cc: Honorable Brendan Byrne
Democratic Legislators
Democratic Congressmen

Exhibit C

ADDENDUM TO
A PROPOSAL FOR CONGRESSIONAL DISTRICTS IN NEW JERSEY

Ernest C. Reock, Jr.

Bureau of Government Research
RUTGERS, The State University of New Jersey
February 16, 1982

The original *Proposal for Congressional Districts in New Jersey* was issued on July 31, 1961, using population data from the Bureau of the Census under Public Law 94-171. Since that time, corrected population figures have been issued by the Bureau, increasing the state's population by 665 persons, all of whom have been added to the population of East Orange. A minor shift in population figures also has taken place between Evesham and Medford Townships in Burlington County.

Addition of the 665 persons to East Orange makes it desirable to re-examine the proposed districts, since the Tenth District, in which East Orange is located, was already the largest of the proposed districts. Accordingly, this *Addendum* to the original proposal suggests changes in the Seventh, Eighth, Ninth, Tenth, Eleventh, and Fourteenth Districts to accomodate the increased population. Pages from the original proposal have been corrected and reproduced with the corrections, so that the changes are easily identifiable.

The results of the changes are as follows:

(1) The range of population from the smallest to the largest district has been reduced from 1,710 to 1,556 persons, and the relative range from .325% to .296% (See Table 3)

(2) All modified districts remain formed of contiguous territory.

(3) The mean average degree of compactness remains at 36%, but the poorest degree of compactness is raised from 17% to 20%.[1] (See Table 4)

(4) No municipalities are divided in the modified plan.

(5) The number of county segments is raised from 45 in the original proposal to 46 in the modified districts.

(6) The political orientation of the plan remains substantially unchanged with the modified districts, resulting in an estimated 7-7 split of districts between the parties if the popular vote splits 50-50%. (See Table 5)

(7) The only incumbents placed together in a single district are Representatives Dwyer and Smith.

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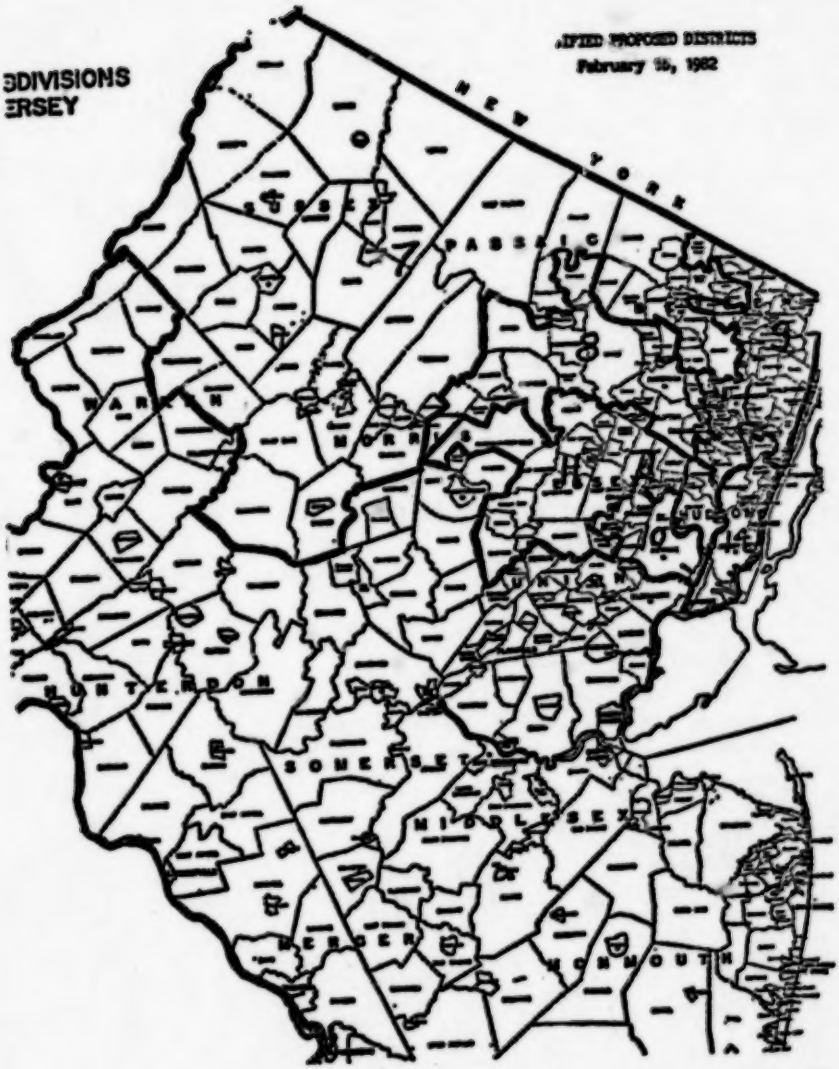
[1] A modified and short-cut method of calculating the degree of compactness is used in this Addendum. Where the original proposal used the area of the district divided by the area of the smallest possible circumscribing circle, the short-cut calculation uses the area of the district divided by the area of a circle drawn around the longest straight-line dimension of the district. Changes in the results are minimal in most cases.



SUBDIVISIONS
JERSEY

ADOPTED PROPOSED DISTRICTS
February 15, 1982

Table 3. Proposed Congressional Districting Plan for 14 Districts Using 1980 Population (Corrected)

Proposed Congressional District	1980 Population	Relative Deviation[1]
1	525,784	~~-.043~~ -.052
2	525,915	~~-.018~~ -.027
3	525,794	~~-.041~~ -.050
4	525,788	~~-.042~~ -.052
5	526,182	~~+.033~~ +.023
6	526,054	~~+.008~~ -.001
7	~~526,802~~ 526,651	~~+.052~~ +.113
8	~~526,337~~ 526,966	~~+.063~~ +.053
9	~~525,726~~ 526,123	~~-.054~~ +.012
10	~~527,008~~ 525,208	~~+.189~~ -.162
11	~~525,398~~ 525,529	~~-.136~~ -.095
12	526,464	~~+.086~~ +.077
13	526,189	~~+.034~~ +.025
14	~~525,776~~ 526,716	~~-.120~~ +.134
Total	~~7,364,150~~ 7,364,823	~~.9254~~ .985%
Average	~~526,011~~ 526,059	~~.0661~~ .063%
Range[2]	~~2,710~~ 1,556	~~.3264~~ .296%

[1] The relative deviation of a district is the percentage by which the population of the district differs from the average district population.

[2] The range of deviations is the difference between the largest and smallest district populations. The range of relative deviations is the absolute range divided by the average district population and expressed as a percentage.

Table 4. Degree of Compactness of Proposed Congressional Districting Plan for 14 Districts; Measured by Area of District as Percentage of Area of ~~Smallest Possible Circumscribing Circle~~ a Circle Drawn Around the Largest Dimension of the District

Proposed Congressional District	Area of District[1]	Area of Smallest Circumscribing Circle[1]	Degree of Compactness
1	656	~~1,344~~ 1,323	~~49%~~ 50%
2	2,102	~~6,487~~ 5,605	~~32%~~ 38%
3	459	~~1,237~~ 1,197	~~37%~~ 38%
4	271	~~736~~ 718	~~37%~~ 38%
5	622	~~2,356~~ 2,213	~~28%~~ 28%
6	567	~~1,760~~ 1,750	~~32%~~ 32%
7	~~1,036~~ 1,032	~~2,098~~ 2,072	~~49%~~ 50%
8	~~202~~ 160	~~471~~ 429	~~34%~~ 37%
9	~~315~~ 117	~~314~~ 332	~~37%~~ 35%
10	37	~~65~~ 86	~~57%~~ 43%
11	~~170~~ 166	~~554~~ 480	~~31%~~ 35%
12	141	423	33%
13	1,118	~~4,681~~ 4,671	24%
14	~~33~~ 40	~~299~~ 187	~~17%~~ 20%
Mean Average[2]			36%

[1] In square miles.

[2] The mean average is the sum of the individual district degrees of compactness, divided by the number of districts.

Table 5. Political Analysis of Proposed Congressional Districts

Districts and Incumbents	Political Orientation of District	Democratic	Republican	Total	Percentage Carried Over
1	Carry-Over Votes	138,255 (78.6%)	37,563 (21.4%)	175,818	93.7%
Florio	Est. New Votes	7,292 (61.7%)	4,527 (38.3%)	11,819	
(D)	Est. Total Votes	145,547 (77.6%)	42,090 (22.4%)	187,637	
2	Carry-Over Votes	117,506 (60.2%)	77,651 (39.8%)	195,157	100.0%
Hughes	Est. New Votes	- -	- -	-	
(D)	Est. Total Votes	117,506 (60.2%)	77,651 (39.8%)	195,157	
3	Carry-Over Votes	71,993 (52.0%)	66,564 (48.0%)	138,557	68.2%
Howard	Est. New Votes	33,962 (52.5%)	30,727 (47.5%)	64,689	
(D)	Est. Total Votes	105,955 (52.1%)	97,291 (47.9%)	203,246	
4	Carry-Over Votes				
Smith(R)	From C.D. 4	9,745 (38.9%)	15,317 (61.1%)	25,062	12.8%
Dwyer(D)	From C.D.15	58,446 (53.5%)	50,820 (46.5%)	109,266	55.6%
	Est. New Votes	31,789 (51.1%)	30,420 (48.9%)	62,209	
	Est. Total Votes	99,980 (50.9%)	96,557 (49.1%)	196,537	
5	Carry-Over Votes	24,433 (22.7%)	83,080 (77.3%)	107,513	54.2%
Fenwick	Est. New Votes	55,524 (61.0%)	35,499 (39.0%)	91,023	
(R)	Est. Total Votes	79,957 (40.3%)	118,579 (59.7%)	198,536	
6	Carry-Over Votes	68,377 (43.2%)	89,588 (56.7%)	157,965	78.9%
Forsythe	Est. New Votes	19,885 (47.1%)	22,333 (52.9%)	42,218	
(R)	Est. Total Votes	88,262 (44.1%)	111,921 (55.9%)	200,183	
7	Carry-Over Votes	46,810 (43.9%)	58,710 (56.1%)	104,720	49.4%
Roukema	Est. New Votes	41,048 (38.2%)	65,730 (61.1%)	107,378	
(R)	Est. Total Votes	87,858 (41.4%)	124,440 (58.6%)	212,306	
8	Carry-Over Votes	86,705 (69.2%)	38,644 (30.8%)	125,549	74.3%
Roe	Est. New Votes	16,664 (39.6%)	25,417 (60.4%)	42,081	
(D)	Est. Total Votes	103,569 (61.4%)	64,061 (38.2%)	167,630	
9	Carry-Over Votes	48,660 (37.1%)	82,470 (62.9%)	131,130	55.8%
Hollenbeck	Est. New Votes	49,705 (47.9%)	54,064 (52.1%)	103,769	
(R)	Est. Total Votes	98,373 (41.9%)	136,534 (58.1%)	234,907	
10	Carry-Over Votes	73,923 (87.7%)	10,360 (12.3%)	84,283	75.1%
Rodino	Est. New Votes	17,739 (63.4%)	10,240 (36.6%)	27,979	
(D)	Est. Total Votes	91,661 (81.6%)	20,600 (18.4%)	112,261	
11	Carry-Over Votes	74,848 (62.7%)	44,606 (37.3%)	119,454	65.6%
Minish	Est. New Votes	38,926 (40.8%)	56,480 (59.2%)	95,406	
(D)	Est. Total Votes	113,774 (53.0%)	101,086 (47.0%)	214,860	
12	Carry-Over Votes	36,543 (21.3%)	134,889 (78.7%)	171,432	84.1%
Rinaldo	Est. New Votes	13,578 (41.8%)	18,905 (58.2%)	32,483	
(R)	Est. Total Votes	50,121 (24.6%)	153,794 (75.4%)	203,915	
13	Carry-Over Votes	23,721 (29.1%)	57,777 (70.9%)	81,498	42.8%
Courter	Est. New Votes	64,679 (59.5%)	44,025 (40.5%)	108,704	
(R)	Est. Total Votes	88,400 (46.5%)	101,802 (53.5%)	190,202	
14	Carry-Over Votes	90,100 (67.0%)	39,409 (33.0%)	129,517	72.9%
Guarini	Est. New Votes	21,471 (70.7%)	13,042 (29.3%)	44,513	
(D)	Est. Total Votes	111,570 (68.0%)	52,451 (32.0%)	164,030	
TOTAL	Carry-Over Votes	959,480	887,456	1,846,936	68.9%
	Est. New Votes	422,063	411,409	834,471	
	Est. Total Votes	1,382,543(51.6%)	1,298,865(48.4%)	2,681,408	

Table 5.

Districts and Incumbents	Political Orientation of District				Percentage Carried Over
		Democratic	Republican	Total	
7 Roukema (R)	Carry-Over Votes	45,340 (44.7%)	56,132 (55.3%)	101,472	48.0%
	Est. New Votes	42,976 (39.2%)	66,787 (60.8%)	109,763	
	Est. Total Votes	88,316 (41.8%)	122,919 (58.2%)	211,235	
8 Roe (D)	Carry-Over Votes	86,905 (69.2%)	38,644 (30.8%)	125,549	74.5%
	Est. New Votes	16,873 (39.2%)	26,210 (60.8%)	43,083	
	Est. Total Votes	103,778 (61.5%)	64,854 (38.5%)	168,632	
9 Hollenbeck (R)	Carry-Over Votes	51,611 (38.1%)	83,964 (61.9%)	135,575	57.8%
	Est. New Votes	46,793 (47.2%)	52,315 (52.8%)	99,108	
	Est. Total Votes	98,404 (41.9%)	136,279 (58.1%)	234,683	
10 Rodino (D)	Carry-Over Votes	72,797 (86.7%)	11,194 (13.3%)	83,991	74.6%
	Est. New Votes	18,115 (63.4%)	10,440 (36.6%)	28,555	
	Est. Total Votes	90,912 (80.8%)	21,634 (19.2%)	112,546	
11 Minish (D)	Carry-Over Votes	77,164 (62.1%)	47,020 (37.9%)	124,184	58.4%
	Est. New Votes	35,961 (40.6%)	52,522 (59.4%)	88,483	
	Est. Total Votes	113,125 (53.2%)	99,542 (46.8%)	212,667	
14 Guarini (D)	Carry-Over Votes	80,108 (67.0%)	39,409 (33.0%)	119,517	71.9%
	Est. New Votes	31,782 (68.0%)	14,932 (32.0%)	46,714	
	Est. Total Votes	111,890 (67.3%)	54,341 (32.7%)	166,231	
TOTAL	Carry-Over Votes	962,944	889,612	1,852,556	69.1%
	Est. New Votes	419,209	409,642	828,851	
	Est. Total Votes	1,382,153 (51.5%)	1,299,254 (48.5%)	2,681,407	

Proposed District 6

Burlington County		
Beverly City	2,919	
Burlington City	10,246	
Burlington Township	11,527	
Cinnaminson Township	16,072	
Delanco Township	3,730	
Delran Township	14,811	
Eastampton Township	3,814	
Edgewater Park Township	9,273	
Evesham Township	~~21,659~~ 21,568	
Hainesport Township	3,236	
Lumberton Township	5,236	
Maple Shade Township	20,525	
Medford Township	~~17,471~~ 17,622	
Medford Lakes Borough	4,958	
Moorestown Township	15,596	
Mount Holly Township	10,818	
Mount Laurel Township	17,614	
New Hanover Township	14,258	
Palmyra Borough	7,085	
Pemberton Borough	1,198	
Pemberton Township	29,720	
Riverside Township	7,941	
Riverton Borough	3,068	
Shamong Township	4,537	
Southampton Township	8,808	
Tabernacle Township	6,236	
Westampton Township	3,383	
Willingboro Township	39,912	
	315,651	315,651
Camden County		
Audubon Park Borough	1,274	
Cherry Hill Township	68,785	
Collingswood Borough	15,838	
Haddon Township	15,875	
Haddonfield Borough	12,337	
Lawnside Borough	3,042	
Magnolia Borough	4,881	
Merchantville Borough	3,972	
Oaklyn Borough	4,223	
Pennsauken Township	33,775	
Tavistock Borough	9	
Voorhees Township	12,919	
Woodlynne Borough	2,578	
	179,508	179,508
Ocean County		
Lakehurst Borough	2,908	
Manchester Township	27,987	
	30,895	30,895
		526,054

Proposed District 7

Bergen County		
Allendale Borough	5,901	
Fair Lawn Borough	32,229	
Franklin Lakes Borough	8,769	
Glen Rock Borough	11,497	
Hillsdale Borough	10,495	
~~Ho-ho-kus Borough~~	~~4,139~~	
Mahwah Township	12,127	
Midland Park Borough	7,381	
Oakland Borough	13,443	
Paramus Borough	26,474	
Ramsey Borough	12,899	
Ridgewood Village	25,208	+Rochelle Park 5,603
Saddle River Borough	2,763	
~~Upper Saddle River Borough~~	~~7,958~~	
Waldwick Borough	10,802	
Woodcliff Lake Borough	3,644	
Wyckoff Township	15,500	
	~~213,219~~	~~213,219~~ 206,735
Morris County		
Butler Borough	7,616	
Chester Borough	1,433	
Chester Township	5,198	
Dover Town	14,681	
Jefferson Township	16,413	
Mine Hill Township	3,325	
Mount Arlington Borough	4,251	
Mount Olive Township	18,748	
Netcong Borough	3,557	
Randolph Township	17,828	
Rockaway Township	19,850	+Rockaway Borough 6,852
Roxbury Township	18,878	
Victory Gardens Borough	1,043	
Washington Township	11,402	
Wharton Borough	5,485	
	~~149,708~~	~~149,308~~ 156,560
Passaic County		
Bloomingdale Borough	7,867	
Ringwood Borough	12,625	
West Milford Township	22,750	
	43,242	43,242
Sussex County	116,119	116,119
Warren County		
Allamuchy Township	2,560	
Frelinghuysen Township	1,435	
	3,995	3,995
		~~526,269~~ 536,651

Proposed District 8

+ Elmwood Park 18,377

Bergen County		
Garfield City	26,803	
Wallington Borough	10,741	
	~~37,544~~	~~37,544~~
		55,921
Morris County		
Boonton Town	8,620	
Boonton Township	3,273	
Denville Township	14,380	
Kinnelon Borough	7,770	
Lincoln Park Borough	8,806	
Montville Township	14,290	
Mountain Lakes Borough	4,153	
Pequannock Township	13,776	
Riverdale Borough	2,530	
~~Roxbury Borough~~	~~6,859~~	
	~~84,450~~	~~84,450~~
		77,598
Passaic County		
Clifton City	74,388	
Haledon Borough	6,607	
Hawthorne Borough	18,200	
~~Little Falls Township~~	~~11,496~~	
North Haledon Borough	8,177	
Passaic City	52,463	
Paterson City	137,970	
Pompton Lakes Borough	10,660	
Prospect Park Borough	5,142	
Totowa Borough	11,448	
Wanaque Borough	10,025	
Wayne Township	46,474	
West Paterson Borough	11,293	397,847
	~~404,343~~	~~404,343~~
	392,847	~~526,392~~
		526,366

Proposed District 9

Bergen County	
Alpine Borough	1,549
Bergenfield Borough	25,568
Bogota Borough	8,344
Carlstadt Borough	6,166
Closter Borough	8,164
Cresskill Borough	7,609
Demarest Borough	4,963
Dumont Borough	18,334
East Rutherford Borough	7,849
Edgewater Borough	4,628
~~Elmwood Park Borough~~	~~10,377~~
Emerson Borough	7,793
Englewood City	23,701
Englewood Cliffs Borough	5,698
Fort Lee Borough	32,449
Hackensack City	36,039
Harrington Park Borough	4,532
Hasbrouck Heights Borough	12,166
Haworth Borough	3,509
Leonia Borough	8,027
~~Little Ferry Borough~~	~~9,398~~
Lodi Borough	23,956
Maywood Borough	9,895
Montvale Borough	7,318
Moonachie Borough	2,706
New Milford Borough	16,876
Northvale Borough	5,046
Norwood Borough	4,413
Old Tappan Borough	4,168
Oradell Borough	8,658
Palisades Park Borough	13,732
Park Ridge Borough	8,515
~~Ridgefield Borough~~	~~10,394~~
Ridgefield Park Village	12,738
River Edge Borough	11,111
River Vale Township	9,489
~~Rochelle Park Township~~	~~5,683~~
Rockleigh Borough	192
Rutherford Borough	19,068
Saddle Brook Township	14,084
South Hackensack Township	2,229
Teaneck Township	39,007
Tenafly Borough	13,552
Teterboro Borough	19
Washington Township	9,550
Westwood Borough	10,714
Wood-Ridge Borough	7,929
	~~525,736~~
	526,123

+ Cliffside Park 21,464

+ Fairview 10,519

+ Ho ho kus 4,129

+ Upper Saddle River 7,958

Proposed District 10

Essex County	77,630	
~~East Orange City~~	~~77,025~~	+ Glen Ridge 7,855
Irvington Town	61,493	
Newark City	329,248	
Orange City	31,136	
South Orange Village Township	15,864	
	~~514,766~~	~~514,766~~
	523,286	523,281
Hudson County		
~~Harrison Town~~	~~13,843~~	~~13,843~~
		~~537,109~~
+ East Newark	1,973	1,923
		525,209

Proposed District 11

Bergen County		
Lyndhurst Township	20,326	
North Arlington Borough	16,587	
	36,913	36,913
Essex County		
Belleville Town	35,367	
Bloomfield Town	47,792	
Caldwell Borough	7,624	
Cedar Grove Township	12,600	
Essex Fells Borough	2,363	
Fairfield Township	7,987	
~~Glen Ridge Borough~~	~~7,855~~	
Livingston Township	28,040	
Maplewood Township	22,950	
Millburn Township	19,543	
Montclair Town	38,321	
North Caldwell Borough	5,832	
Nutley Town	28,998	
Roseland Borough	5,330	
Verona Borough	14,166	
West Caldwell Borough	11,407	
West Orange Town	39,510	
	~~325,609~~	~~325,685~~
	317,830	317,830
Hudson County		
~~East Newark Borough~~	~~1,933~~	
Kearny Town	35,735	+ Harrison Town 17,242
~~Secaucus Town~~	~~13,719~~	
	~~51,387~~	~~51,377~~
		47,977
Morris County		
Chatham Borough	8,537	
Chatham Township	8,883	
East Hanover Township	9,319	
Florham Park Borough	9,359	
Madison Borough	15,357	
Parsippany-Troy Hills Township	49,868	
	101,323	101,323
		~~525,200~~
Passaic County + Little Falls	11,496	11,496
		525,539

Proposed District 14

Bergen County		+ Little Ferry 9,399 + Ridgefield 10,284
~~Cliffside Park Borough~~	~~21,464~~	
~~Fairview Borough~~	~~10,519~~	
	~~31,983~~	~~31,983~~ 19,683
	19,683	
Hudson County		
Bayonne City	65,047	
Guttenberg Town	7,340	
Hoboken City	42,460	
Jersey City City	223,532	
North Bergen Township	47,019	+ Secaucus 13,719
Union City City	55,593	
Weehawken Township	13,168	
West New York Town	39,194	
	~~493,353~~	~~493,353~~
	507,072	~~525,336~~
		526,765

Exhibit D

Exhibit E

MODIFIED PROPOSED DISTRICTS
February 16, 1982
NEW YORK
PASSAIC
SUSSEX
MORRIS
ESSEX
HUDSON
UNION
WARREN
HUNTERDON
SOMERSET
MIDDLESEX
MERCER
MONMOUTH
7
8
9
11
10
14

PLAINTIFFS' EXHIBIT NUMBER 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF CRAIG J. EXELBIRT

CRAIG J. EXELBIRT, being duly sworn, deposes and says:

1. I am a Councilman representing the 4th Ward of the City of Elizabeth, New Jersey, and am Chairman of the City Democratic Committee.

2. On or about January 27, 1982, I received the letter which is attached hereto as Exhibit A. This letter is written on official stationery and signed by Assemblyman Raymond J. Lesniak, Democrat of the 21st Assembly District in Union and Middlesex Counties. The letter is addressed to the Democratic council members of the Elizabeth Municipal Council.

/s/ Craig J. Exelbirt
CRAIG J. EXELBIRT

[Notarization Omitted in Printing]

RAYMOND J. LESNIAK
Assemblyman, District 21 (Union-Middlesex)
60 Prince Street
Elizabeth, N.J. 07202

Tel. 201-353-7722

[SEAL]

General Assembly
of New Jersey
Trenton

January 24, 1982

Dear Elizabeth Democratic Councilman,

I am enclosing a copy of the Congressional redistricting plan signed into law last week.

A little background into the development of this plan bears remembering. Initially, Democratic leaders sought to place Elizabeth into a district with Newark. After that proposal was defeated, efforts were made to place Elizabeth with Jersey City, which were also defeated.

A primary concern of mine was to protect the interest of Elizabeth and advance its position as the "focal" point of a congressional district. Of course, other legislators had their own goals which often conflicted with mine. Since our Union County delegation consists of only two Democratic legislators, the other delegations, such as Middlesex, Essex and Hudson, had a distinct advantage. Nevertheless, we were successful in securing a district which places Elizabeth in a dominant position. Also, the final plan gives Union County the advantage of electing *ten* congressional representatives.

I would like to emphasize the importance of the final redistricting plan passed by the legislature. With the Republican party taking aim at obtaining control of the

House of Representatives, every seat takes on an added significance. If the Republican party were to secure control of the House of Representatives and the Senate, with help from their vast resources from big business and special interests, the current policies of hugh tax breaks for oil companies and tobacco and sugar conglomerates, astronomical budget deficits and high interest rates, tax-exemptions for schools that practice discrimination and reversing hard won gains over pollution of our air, water and land, will be given a tremendous boost.

In addition to its national implications, the plan also has significant impact upon our state Democratic congressional delegation. It gives the New Jersey Democratic party an opportunity to elect 10 congressional representatives. This would be a major boost to our state, county and local Democratic office holders and candidates. That is why the final plan had the unanimous support of the Democartic state senators and assemblymen, Governor Byrne, the entire Democratic congressional delegation and the Democratic state chairman.

Because of the national, state, county and local benefits inuring to the Democratic party and its officeholders and candidates, and the benefits derived by Elizabeth and Union County, any Democrat who would oppose this plan would be doing so for selfish, personal, political reasons. It would be a statewide and national disgrace for any Democrat to join with the Republican party to help them achieve their goals.

I have been informed that you have been asked to help the Republican party in its efforts to overturn the redistricting plan, jeopardize our Democratic congressional delegation (which is considered one of the strongest in the nation with many senior members in key committee positions) and advance the goals of the Republican administration. I know that your respect for the Democratic party and your position as a responsible Democratic

leader ensure that you would not even consider such a proposal.

If you have any questions about the redistricting plan, please call me.

Sincerely,

/s/ Raymond J. Lesniak
RAYMOND J. LESNIAK

PLAINTIFFS' EXHIBIT NUMBER 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF RICHARD ZIMMER

RICHARD ZIMMER, being duly sworn, deposes and says:

1. I am a member of the New Jersey General Assembly, representing the 23rd District, and am an attorney-at-law.

2. During the discussion on the bill which became P.L. 1982, c.1, I asked a number of questions of Assemblyman Byron Baer, the bill's sponsor, on the Assembly floor.

3. I was aware of the fact that alternative redistricting plans were available to the Legislature at the time of the debate on P.L. 1982, c.1, and Assemblyman Baer acknowledged his awareness of them at that time.

4. During my questioning of Assemblyman Baer, I asked how he had drawn the district lines in his plan. He refused to respond.

5. I also asked him how his bill met the requirement of equal population among the various districts. He replied, in substance, that you can't have perfect equality and that therefore it is necessary to balance population equality against other criteria.

6. After I concluded my remarks, Speaker *pro tem* Christopher Jackman rose and addressed himself to me in particular and the freshman legislators in general. He stated, in substance, that although he sympathized with our desire to speak because it was the first time we had had that opportunity, he did not know what we

were talking for because the Democrats had the votes to pass Assemblyman Baer's bill. He added that it was getting late, that there were going to be a lot of festivities that night, and that he did not think that we wanted to attend them "looking like a rag-picker." He further stated that when the Republicans had a majority they had drawn the redistricting maps the way they wanted them drawn, and that now the Democrats were just doing the same thing that the Republicans had done.

/s/ Richard Zimmer
RICHARD ZIMMER

[Notarization Omitted in Printing]

PLAINTIFFS' EXHIBIT NUMBER 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Caption Omitted in Printing]

AFFIDAVIT OF LARRY WEITZNER

LARRY WEITZNER, being duly sworn, deposes and says:

1. I am a Research Assistant to the Assembly Minority. Attached hereto as Exhibit A are maps of the following congressional redistricting plans that were available for consideration by the Legislature of the State of New Jersey at the time of the enactment of P.L. 1982, c.1:

	Sponsor	Bill No.
a.	Kavanaugh Parker	A-3776 S-3525
b.	DiFrancesco	S. 3547
c.	Hardwicke	A-3573
d.	Gagliano Bennett	A-3794 S-3549

	Sponsor	Bill No.
e.	Hagedorn Kern	S-3328 A-3646
f.	Hagedorn Kern	S-3538 A-3767
g.	Gagliano	A-614
h.	Kavanaugh	A-615
i.	Hardwicke	A-3817

2. I have also attached as Exhibit B copies of the official roll call votes recorded in the State Senate on the following bills:

S-3525	December 17, 1981
S-3547	January 7, 1982
S-3548	January 7, 1982
S-3549	January 7, 1982
S-3549	January 11, 1982

3. S-3549 was considered by the Senate twice. On January 7, 1982, the bill received 14 affirmative and 9 negative votes, but did not receive the absolute majority of 21 votes necessary for enactment. When it was reconsidered on January 11, 1982, it was defeated by a vote of 18 to 11.

/s/ Larry Weitzner
LARRY WEITZNER

[Notarization Omitted in Printing]

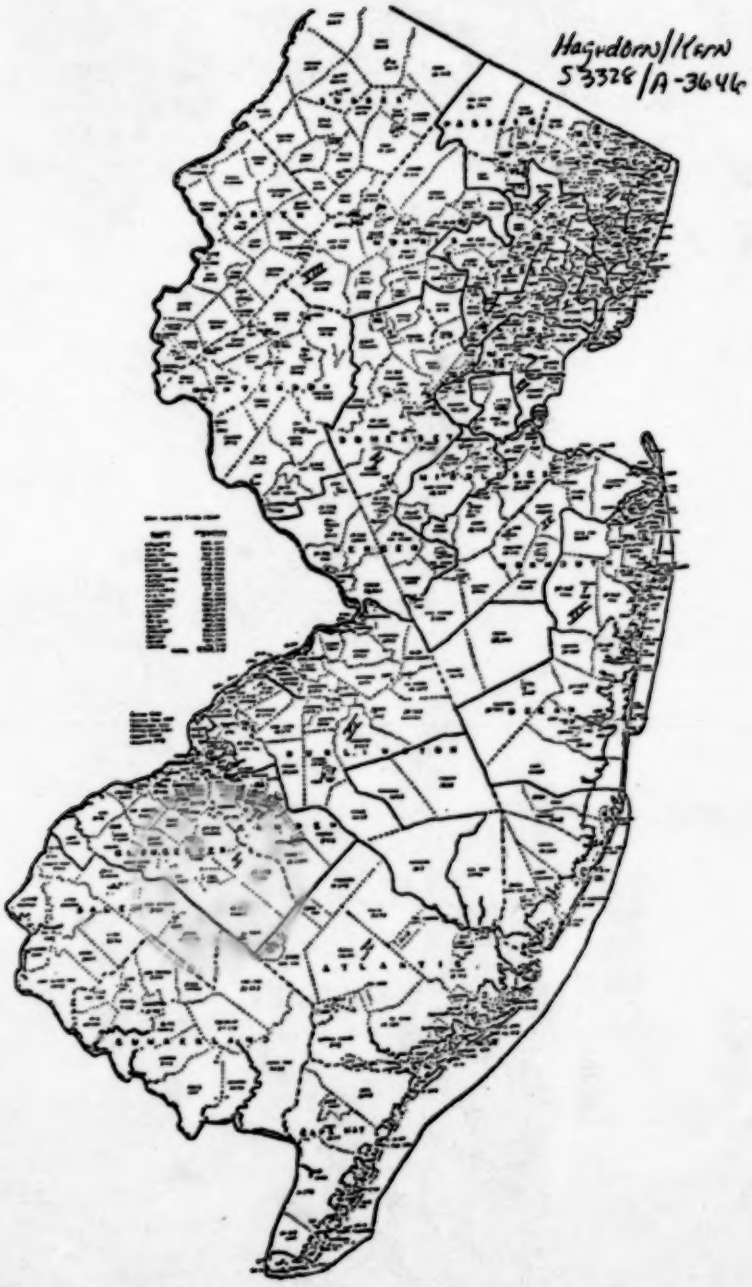
Exhibit A

Kavanaugh / Parker
A 3776 / S3525

DiFrancesco
S-3547
ATLANTIC

A 3573" Hardwick

Cafiero/Bennett
A-3794/S-3549

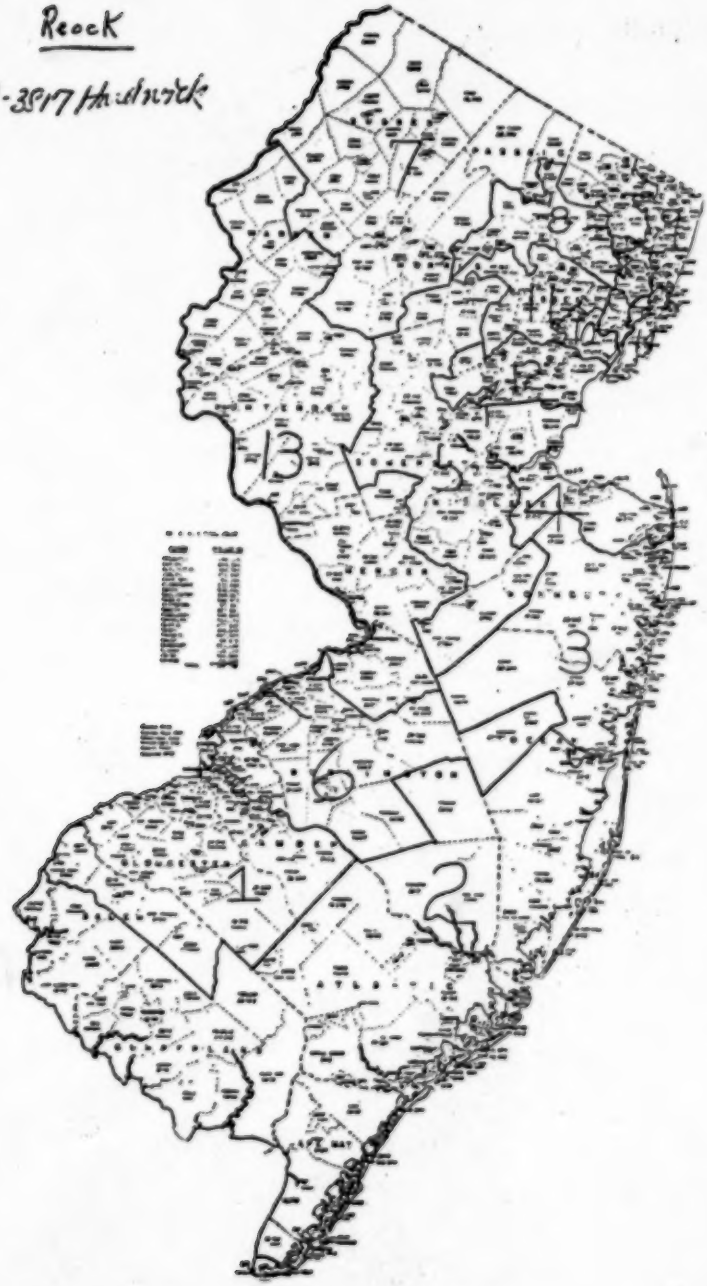

Hagedorn/Horn
53328/A-3646

Hagedorn/Kerns
53538 / A-3767

A-614

Reock

A-3817 Hardwick



Title Kavanagh

Exhibit B

NEW JERSEY SENATE

1981 SESSION

ROLL CALL 16

1981 LEGISLATURE

YEA	N-V	NAY
Bodell		
Cafiero		
Caufield		
DiFrancesco		
Dodd		
Dorsey		
Dumont		
Errichetti		
Ewing		
Feldman		
Foran		
Gagliano		
Goldieri		
Graves		
Gregorio		
Hagedorn		
Hamilton		
Herbert		
Hirkala		
Kennedy		
Laskin		
Lipman		
Maressa		
Merlino		
Musto		
Orechio		
Parker		
Perskie		
Rodgers		
Russo, A.		
Russo, J.		
Shell		
Skevin		
Vreeland		
Wallwork		
Weiss		
Yates		
Zane		

S 3548 LIE OVER 10-12

YEAS	N-V	NAYS

BILL NUMBER

HOUSE	SENATE	RESO. BILL

DATE:

NEW JERSEY SENATE

1981 SESSION

17

ROLL CALL

1981 LEGISLATURE

YEA	N-V	NAY
_Bedell	●	
●Cafiero		
_Caufield	●	
●DiFrancesco		
●Dodd		
●Dorsey		
_Dumont	●	
_Errichetti	●	
_Ewing	●	

YEA	N-V	NAY
_Feldman	●	
●Foran		
●Gagliano		
_Galdieri		●
_Graves	●	
_Gregorio	●	
●Hagedorn		
_Hamilton	●	
_Herbert		●
_Hirkala		●

YEA	N-V	NAY
_Kennedy	●	
●Laskin		
_Lipman		●
_Maressa		●
_Merlino		●
_Musto	●	
_Orechio		●
●Parker		
_Perskie		●
_Rodgers		●

YEA	N-V	NAY
_Russo, A.	●	
_Russo, J.	●	
_Sheil	●	
_Skevin		●
●Vreeland		
●Wolfwork		
_Weiss		●
_Yates	●	
_Zane		●

S 3547 LIE OVER 11-12

YEAS	N-V	NAYS
●_____	_____	_____
_____	_____	●_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

BILL NUMBER

HOUSE	SENATE	RESO.	BILL
_1000	_100	_10	1_
_2000	_200	_20	2_
●3000	_300	_30	3_
_4000	_400	●40	_
	●500	_50	_
_Ex. Ses.	_600	_60	_
●3rd 1	_700	_70	7_●
_Ren.	_800	_80	_
1_Int.	_900	_90	_

DATE

●_____	1_
_____	2_
_____	1_
_____	2_
_____	3_
_____	4_
_____	5_
_____	6_
_____	7_●
_____	8_
_____	9_

NEW JERSEY SENATE

1981 SESSION

ROLL CALL 13

1981 LEGISLATURE

YEA	N-V	NAY
_Bedell		●
●Coffaro		
_Caufield		●
●DiFrancesco		
_Dodd		●
●Dorsey		
_Dumont	●	
_Erickhettie		
_Ewing	●	

YEA	N-V	NAY
_Feldman		●
●Foran		
●Gagliano		
_Goldieri		●
_Graves	●	
_Gregorio		●
●Hagedorn		
_Hamilton	●	
_Herbert		●
_Hirkala		●

YEA	N-V	NAY
_Kennedy	●	
●Laskin		
_Lipman		●
_Maressa		●
_Merlino		●
_Musto	●	
_Orechio		●
●Parker		
_Perskie		●
_Rodgers		●

YEA	N-V	NAY
_Russo, A.		
_Russo, J.		●
●Shell		
_Skevin		●
●Vreeland		
●Wallwork		
_Weiss	●	
_Yates		●
_Zane		●

S 3549 LIE OVER 11-18

YEAS

N-V

NAYS

BILL NUMBER

HOUSE
SENATE

RESO.
BILL

DATE:

NEW JERSEY SENATE 14

1981 SESSION

ROLL CALL

1981 LEGISLATURE

YEA	N-V	NAY
Bedell	●	
●Cafiero		
Caufield	●	
●DiFrancesco		
●Dodd		
●Dorsey		
Dumont	●	
Errichetti	●	
Ewing	●	

YEA	N-V	NAY
●Feldman		
●Foran		
●Gagliano		
Goldieri	●	
●Graves		
Gregorio	●	
●Hagedorn		
Hamilton	●	
Herbert	●	
Hirkala		●

YEA	N-V	NAY
Kennedy	●	
●Laskin		
Lipman		●
●Maressa		
Merlino		●
Musto	●	
Orechio		●
●Parker		
Perskie		●
Rodgers		●

YEA	N-V	NAY
Russo, A.	●	
Russo, J.		●
Sheil	●	
Skevin		●
●Vreeland		
●Wallwork		
Weiss	●	
Yates	●	
Zane		●

S 3549 LIE OVER 14-9

YEAS	N-V	NAYS
●1		1
●2		2
3		3
4		4
5		5
6		6
7		7
8		●

BILL NUMBER

HOUSE		RESO. BILL	
1000	1100	10	1
2000	2100	20	2
●3000	3100	30	3
4000	4100	●40	4
	●5000	50	5
Ex. Rec.	6000	60	6
●3rd R	7000	70	7
Rec.	8000	80	8
Rec.	9000	90	●

DATE:

●JAN	1
FEB	2
MAR	3
APR	4
MAY	5
JUN	6
JUL	7
AUG	8
SEP	●9
OCT	10
NOV	11
DEC	12

1981 SESSION

ROLL CALL 15

1981 LEGISLATURE

YEA	N-V	NAY
Bedell	•	
Cefiero	•	
Caufield		•
DiFrancesco		
Dodd		•
Dorsey	•	
Dumont	•	
Ertichelli	•	
Ewing	•	
Feldman		
Feron	•	
Gagliano	•	
Goldieri		
Graves		
Gregorio		
Hagedorff		
Hamilton	•	
Herbert		
Hirkala		
Kennedy	•	
Leslin	•	
Lipman		•
Maressa		
Merlino	•	
Musto	•	
Orechio		
Parker	•	
Perskie		
Rodgers		•
Russo, A.		
Russo, J.		
Shell	•	
Skevin		
Vreeland	•	
Wallwork	•	
Weiss		
Yates		
Zane		

LOST S 3525 15-4

YEAS	N-V	NAYS
15		

BILL NUMBER

HOUSE	SENATE	RESO. BILL
1800	100	
2000	200	
3000	300	
4000	400	
	500	
Fin. Rec.	600	
Sub B	700	
Cal.	800	
Inv.	900	

DATE: 5/18/81

DEFENDANTS' EXHIBIT NUMBER 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

STATEMENT OF ALAN J. KARCHER

ALAN J. KARCHER, makes the following statement:

1. I am the Speaker of the New Jersey Assembly and have held that position since January 12, 1982. On that date the 200th Legislature of the State of New Jersey commenced. I make this statement in support of a motion to dismiss two complaints filed in United States District Court challenging the constitutionality of P.L. 1982, c.1 (The New Jersey State Congressional Redistricting Law).

2. I have served as an Assemblyman in the New Jersey State Legislature since 1974. During the course of my tenure I have held various positions of responsibility in that chamber including the position of majority leader while the 199th Legislature was in session. My interest in state and congressional redistricting dates to at least the fall of 1980 when, because of my position, I was asked to attend a reapportionment seminar sponsored by the National Council of State Legislatures in Salt Lake City, Utah. I attended that seminar in December of 1980.

3. During the course of that seminar, which was attended by legislators from many other states and by experts in the field of redistricting, we discussed the various cases in the United States Supreme Court and in other federal and state courts dealing with congressional and state reapportionment issues. We also discussed various guiding principles which are applicable to redistricting since the Supreme Court decided *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and *Wesberry* v. *Sanders*, 376

U.S. 1 (1964). In discussion at the seminar and in my subsequent activities in the reapportionment area I sought to build various constituencies around the following principles:

(a) Equality of population in the various districts;

(b) Sensitivity to the unnecessary fragmentation and dilution of minority voting rights in districts having significant minority populations and communities of interest;

(c) The preservation of cores of preexisting districts where practicable;

(d) The preservation of municipal boundary lines in New Jersey.

Of course, as the majority leader of the Democratic members of the Assembly I was interested that both congressional and legislative districts of incumbent Democrats be preserved.

4. After attendance at this seminar in early 1981, I became actively involved in the redistricting process of the State of New Jersey serving on the New Jersey Reapportionment Commission. That Commission which is composed of five members from the Democratic Party and five members of the Republican Party seeks to redraw district lines based upon changes in population occurring in legislative districts during the past ten (10) year period. During the course of my efforts on this Commission, I sought to implement the principles which I discussed above and attempted through conversations to build a consensus for State reapportionment based upon these principles.

5. I became actively involved as a legislator in the redistricting process respecting congressional reapportionment in the fall of 1981 after the New Jersey gubernatorial election. In my position as majority leader for the

Assembly in the 199th Legislature, it was my responsibility to build a consensus for a redistricting plan which would satisfy the constitutional goals of equal representation in the various congressional districts to be drawn, and at the same time to insure that significant racial minorities with communities of interest were not unnecessarily fragmented in the process. Within those constitutional constraints, I also sought to build a consensus for passage of legislation which recognized important, though non-constitutional, legislative concerns such as preserving core constituencies; and, preventing fragmentation of municipalities within the State of New Jersey. I, of course, as a politician was concerned that incumbent congressmens' constituencies be protected where possible.

6. In the process of consensus building in the Legislature and elsewhere, I met with various individuals including incumbent congressmen, various members of the State Legislature, representatives of the executive branch, including the Governor, and members of the various communities within the State, including mayors of various municipalities.

7. As I indicated, during the period between November 1981 and January 19, 1982, the date S-711 was passed by the Legislature and signed into law, I had numerous meetings in an effort to build a constituency for a constitutionally acceptable plan. Meetings which stand out in my mind and which reflect discussion by various Democratic members of the Legislature and others on the subject of congressional redistricting are set forth below.

8. One such meeting occurred in Mt. Laurel, New Jersey approximately two weeks after the gubernatorial election in New Jersey. This November 1981 meeting included various congressional and state legislative representatives as well as representatives from the Governor's office. During the course of conversations at that meet-

ing, the concept of equality of population within the districts was considered as a primary factor in redistricting. During the course of that meeting, I advised several of the attendees that it was important that numerical equality be considered since it would be a useless exercise if the Legislature enacted a redistricting law which could not withstand judicial scrutiny. Other discussions during that Mt. Laurel meeting concerned the Newark based congressional district. Many of the attendees at this meeting were concerned lest any redistricting plan dilute the minority strength of the then Tenth Congressional District. Other concerns which were discussed during the course of that meeting involved preservation of municipal boundary lines, various interests of incumbent congressmen, both Republican and Democratic.

9. At least one other meeting occurred about that time involving the same subject. That meeting which took place in November of 1981 at the Nassau Inn in Princeton, New Jersey involved representatives of the leadership in both the Assembly and Senate as well as representatives of the Governor.

10. In mid-December of 1981 both the Senate and the Assembly passed two different redistricting plans which were forwarded to the Governor. The first such plan sponsored by Senator Graves (S-3518) the ("Graves Plan") contained within it a Newark based district which was identical to the present Tenth Congressional District existing by virtue of the passage of the New Jersey Congressional Redistricting Law. The second plan was introduced by Senator Yates (S-3527).

11. In early January 1982 there was a meeting held with many congressional Democratic incumbents, many of the majority leadership of the 199th Legislature, the Governor and other representatives of the executive branch, and a number of mayors of large cities in the State of New Jersey. One of those in attendance was Mayor Gibson of Newark. Mayor Gibson during the

course of this meeting expressed concern that the "Bergen Plan" would join several suburban communities in Union with the City of Newark, and observed that there were little shared community interests between these entities. I recall that Congressman Peter W. Rodino, Jr. also expressed those concerns at the meeting. Again, I wish to stress that the expressed concern that minority voting rights not be diluted and communities of interest be preserved was discussed in the context of achieving population equality within the various congressional districts as well as considering the various non-constitutional, though legislatively desirable, goals which I have previously discussed. Protection of incumbent congressman was also a discussion topic at that meeting.

12. It was evident that in order to build legislative consensus for the passage of a constitutionally sound redistricting plan, the concerns of the State representatives of Bergen County had to be balanced against the equally important concerns of the Newark and Essex based legislators. At the start of the 200th Legislature in which I was elected Speaker, a consensus began to form around a compromise; that is, S-711 introduced by Senator Feldman and a companion bill introduced in the Assembly by Assemblyman Byron M. Baer. Those bills preserve the Tenth Congressional District as drawn in the Graves Plan, and yet make certain alterations in other district lines so as to insure that Bergen County has one intact congressional district within its boundaries —the Ninth.

13. After introduction of both bills in the appropriate legislative chambers, S-711 was passed by the Senate and, by motion, was substituted for an A-605 on the floor of the Assembly. Thereafter, it was enacted by the Legislature and forwarded to the Governor for signature. I know that the Governor signed this legislation on January 19, 1982 and the bill became law as P.L. 1982 c.1.

14. I believe that the congressional redistricting law in New Jersey is constitutional in all respects and that for that reason the Court should dismiss the complaint of the plaintiffs.

15. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Alan J. Karcher
ALAN J. KARCHER

Executed on February 24, 1982

DEFENDANTS' EXHIBIT NUMBER 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

STATEMENT OF THE HONORABLE
KENNETH A. GIBSON

KENNETH A. GIBSON, of full age, makes the following statement under penalty of law:

1. I am the Mayor of the City of Newark and have served in that capacity since my initial election in 1970. I have been asked to execute this Affidavit in support of retaining the congressional redistricting plan as enacted by the New Jersey legislature.

2. Newark is New Jersey's largest city. It is also, by far, the city which possesses the largest concentration of black and minority population within the State of New Jersey. If New Jersey is to have a congressional district where minority residents will have the ability to elect a representative of their choice, it can necessarily be only the district which surrounds and includes the City of Newark.

3. Based upon the redistricting established after the 1970 census, Newark was placed in a compact geographic district in which the minority population was well in excess of fifty percent. However, following the 1980 census it became evident that the geographic bounds of the Tenth Congressional District would have to be expanded. There were two basic reasons explained to me. First the population of the "ideal" congressional district had grown by approximately 50,000 people. Second, during the decade of the 1970's, those residing in the existing Tenth District had declined in population, according the Census Count, by approximately 50,000 people. Hence,

the population shortfall for a new district starting from the existing 1970 boundaries was approximately 100,000 people to achieve the required population equality.

4. Many legislative bills, proposals, and proffered alternatives, were suggested during the long legislative process which preceded the enactment of the plan ultimately adopted. Several of them would have, in my opinion, radically altered the racial and ethnic characteristics of the Tenth District and would have seriously diluted the voting strength of blacks in this district. For that reason, I opposed each of these efforts, whether made by Democrats, Republicans or supposed non-partisan groups.

5. A recurring proposal would have included Elizabeth in the reconstituted congressional district. The City of Elizabeth has a very different socio-economic make-up than the City of Newark and does not share a community of interest with it. In a very real sense, Elizabeth is oriented to its south and west pointing towards Union County, rather than Newark. Moreover, the inclusion of Elizabeth in the district would reduce the black constitutency in the district perilously close to 50%, thereby jeopardizing any reasonable probability of permitting its black residents to elect a representative of their choice.

6. Other proposed redistricting plans suggested additions to the Tenth District including non-contiguous Union County suburbs such as Union and Springfield or, as proposed in a bill introduced by Walter J. Kavanaugh on December 17, 1981 (S.——), the inclusion of the City of Bayonne across Newark Bay in Hudson County within the district. Both I and the Essex County legislators with whom I worked strenuously fought and lobbied against any efforts to dilute the racial composition of the Tenth District or to permit the District to add far away areas which had no previous long term community of interest with the City of Newark which was to serve as the hub of the District.

7. Sometime in December 1981 a redistricting proposal identified as S-3518, commonly called the "Graves Plan" was put forth which, although differing in other respects with the eventual redistricting law, contained the identical boundaries ultimately selected for the Tenth District. The "Graves Plan" adds the municipalities of Irvington, South Orange, and Hillside, all of which are contiguous to Newark, to the pre-existing boundaries of the District, preserves a community of interest within the Tenth District and yields a black population percentage approaching 55%.

B. On or about December 14, 1981, I drafted and forwarded to Wynona M. Lipman, the state senator whose district lies exclusively in Newark and who is currently the only black serving in the State Senate, a letter urging her to support the Graves plan insofar as it concerned the configuration of the Tenth District. A copy of that letter is attached to this Affidavit and it recites the concerns I had then and the conclusion that I reached that the boundaries for the Tenth District shown in the Graves Plan (and ultimately incorporated in the plan as enacted) was the only equitable redistricting plan which would ensure the franchise of our constitutents in Newark. I have been informed that my letter to Senator Lipman was widely circulated throughout the Legislature.

9. I, and others on my behalf, lobbied extensively and arduously in favor of this proposal which would assure a reasonable probability that a person chosen by minority voters would be elected in the Tenth District. I am as convinced today as I was in January when I urged adoption of the plan as essentially enacted that one of its fundamental strengths was its fairness to minority interests in the Essex County area to assure them a reasonable likelihood of achieving a place in the New Jersey Congressional delegation. Because of that, I concluded that it was the only plan which could be supported by me at that time and I took every step I could as a community leader to urge its approval.

10. As a Democratic leader, I also urged the creation of other congressional districts which would not jeopardize the status of Democratic incumbents. That activity was, however, always suborinated in my mind to my primary goal of protecting and maintaining the Tenth District as a seat which would be chosen by minority voters.

11. I would request that this Court affirm the determination of the New Jersey legislators who sensitively and forthrightly resolved the question of maintaining a district for minority representation in this state by the adoption of S-711 or P.L.1982 c.1.

12. I certify under penalty of perjury that the foregoing is true and correct.

/s/ Kenneth A. Gibson
KENNETH A. GIBSON

Executed on February 24, 1982.

Exhibit A

[SEAL]

KENNETH A. GIBSON
Mayor
Newark, New Jersey
07102

December 14, 1981

Hon. Wynona M. Lipman
Senator
50 Park Place, Suite 938
Newark, New Jersey 07102

Dear Senator Lipman:

I urgently request that you vote affirmatively to adopt the redistricting plan in S-3518 as proposed by Senator Graves. That plan would create 14 Congressional Districts in New Jersey, one of which would include Newark, East Orange, Glen Ridge, Harrison, Irvington, South Orange and Hillside.

After extensive analysis of this issue and numerous discussions with those affected by the redistricting, I have concluded that this is the only plan which can be supported at this time. In-depth reviews of various proposals by our State Senate delegation, our Congressional delegation and the voters in this area have convinced me that S-3518 represents the only equitable redistricting plan which would ensure the franchise rights of our constitutents.

Please vote to support S-3518 today as the redistricting plan for New Jersey. It is one of the most important votes you can cast.

Thank you for your continued support and cooperation.

Sincerly,

Kenneth A. Gibson

KAG:pa

DEFENDANTS' EXHIBIT NUMBER 3

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF THE HONORABLE
THOMAS H. COOKE, JR.

THOMAS H. COOKE, JR., of full age, being duly sworn upon his oath deposes and says:

1. I am the Mayor of the City of East Orange and have served in that capacity since my initial election in 1977. I have been asked to execute this affidavit in support of retaining the Congressional redistricting plan as enacted by the New Jersey Legislature. I believe that the retention of the Tenth District with a minority population in excess of 50 percent avoids damaging dilution to the efforts of minorities to be assured of effective representation in the Congressional delegation.

2. Other than the City of Newark, the City of East Orange has the largest concentration of black and minority population within the County of Essex. Essex County has the largest minority and black population of any County in the State of New Jersey. During the recent January 1982 Legislative session which led to the enactment of a Congressional redistricting plan, my representatives as well as myself personally and repeatedly lobbied with our Legislators in Trenton, as well as with other members sympathetic to our cause, to assure the greatest likelihood of maintaining a Congressional District in Essex County where minority residents can elect a representative of their choice.

3. I favored and personally supported the retention of the Tenth District with slightly expanded geographic boundaries to accommodate the increased ideal population

district size required by the 1980 Census. The proposal for the Tenth District, as enacted, preserved the community of interest of the minorities within this geographic region while still maintaining the integrity of municipal boundaries.

4. Having become generally aware of other proposed plans, I found that the plan, as enacted, was eminently satisfactory in avoiding any minimization of the voting strength of racial and ethnic minorities within the Essex County area, which remains the only geographic region within the State where a District can be created with a minority population in excess of 50 percent, coincident with the creation of a district which preserves communities of interest and accommodates municipal boundaries.

5. The redistricting plan as adopted, in my opinion, avoids dilution of minority interest and presents a reasonable probability that a person chosen by minority voters would be elected in the Tenth District. For that reason, I supported what ultimately became P. L. 1982, c. 1. I would earnestly request that the Court affirm the determination of the New Jersey Legislators who sensitively and forthrightly handled the question of minority representation in this State.

/s/ Thomas H. Cooke, Jr.
THOMAS H. COOKE, JR.

[Notarization Omitted in Printing]

DEFENDANTS' EXHIBIT NUMBER 4

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF S. HOWARD WOODSON, JR.

S. HOWARD WOODSON, JR., of full age, being duly sworn upon his oath deposes and says:

1. I am the President of the New Jersey Civil Service Commission and I have been previously elected to the New Jersey General Assembly. In 1964, I culminated my career by being the first elected black Speaker of the New Jersey General Assembly in the 1974-1975 session. I am past Chairman of the New Jersey Black Americans, Inc., affiliated with the State Democratic Party and former President of the New Jersey Conference of the N.A.A.C.P. I am additionally at present a candidate for Mayor of the City of Trenton.

2. It has been brought to my attention that Assemblyman Charles Hardwick, at the 199th Session of the New Jersey Legislature, introduced Assembly Bill 3817 as a proposed congressional redistricting plan.

3. A review of Mr. Hardwick's Bill A-3817 reveals that fourteen municipalities in Burlington County which are included in District 4, the Trenton based congressional district of P.L. 1982, c.1, are not combined with his Trenton based district. One half of the Burlington County municipalities contain significant black populations (10% or more of the total population). The total black population in the fourteen municipalities is 31,076. In the proposed A-3817 these municipalities would have been placed in the 6th Congressional District where the black component of their population would constitute more than half of the total black population in the 6th

District. The total black population of the 6th District would be 9.7% of district's population.

4. As a result of the inclusion of the Burlington municipalities, the Trenton district in P.L. 1982 c.1, has a black population of 17.3%, while the black population of the Trenton district in A-3817 is only 11.9%. The total black population for this district is 91,095 in P.L. 1982, c.1 and 62,666 in A-3817. By combining municipalities with significant black population in one district, P.L. 1982, c.1., significantly enhances the congressional influence of blacks in both counties.

5. In addition it appears that there is little likelihood of any significant increase in the potential influence that blacks might have over the next ten years in the Trenton based district as drawn in A-3817. Most of the black population of that district is in Mercer County. If the black population of 53,058 in those Mercer County municipalities which have been included in both plans is subtracted from A-3817 the remaining black population in predominately rural and white Hunterdon and Warren counties is only 9,608. It should be noted that the largest black population in any municipality in all of Hunterdon and Warren counties is 348. What growth potential there is for black influence in A-3817, therefore, must come from Mercer County. Since the total black component of this district is only 11.9% in 1980 it is doubtful that the growth of the black population in Mercer County could, in ten years, bring the black component up to the 17.3% level established by P.L. 1982, c.1.

6. On the other hand, there is evidence that the black population component of the district in P.L. 1982 c.1, will increase as a percentage of the whole over the next ten years. The total population of the fourteen Burlington County municipalities has decreased by 8% over the last ten years (178,027 to 164,252). But those seven municipalities with a significant (10% or more) black population have grown since 1970 by 7%, from 103,257 to

110,682. Furthermore, the black population of all fourteen municipalities increased 117.5% in the ten years between 1970 and 1980. Regardless of the rate of growth of the black population in Mercer County, therefore, the inclusion of the Burlington County municipalities in P.L. 1982 c.1, increases the probability that black voting strength will rise over the next ten years as compared to the probable effect of A-3817.

7. As a black political activist with what I believe to be many years of experience in minority representation, I am unalterably opposed to A-3817 which combines the City of Trenton as well as Mercer County with predominately rural and white Hunterdon County and Warren County in one congressional district.

8. I have reviewed P.L. 1982 c.1, the present New Jersey Congressional Redistricting Plan, and believe that it is significantly superior to A-3817 respecting the consideration of minority representation. Furthermore, A-3817 in my opinion effectively dilutes minority voting rights and ignores the concept of communities of interest.

9. It has also been brought to my attention that Assemblyman Dean Gallo, at the 199th Session of the New Jersey Legislature, introduced Assembly Bill 3772 as a proposed congressional redistricting plan.

10. A review of Mr. Gallo's Bill A-3772 reveals that it had as one of its proposals the placing of the City of Trenton and the City of Camden in the same congressional district.

11. As a black political activist with what I believe to be many years of experience in minority representation, I am unalterably opposed to the inclusion of the cities of Camden and Trenton in the same congressional district. To do so would severely impact as a detriment to minority representation in central and southern New Jersey.

12. The city of Trenton has a black minority population of 45.4% which comprises 17.3% of the population of its congressional district and the city of Camden has a black population of 53% which comprises 14.6% of the population of its congressional district. These percentages taken individually constitute two strong minority voices and allow for these two groups of minorities to rest their concerns on two Congressmen rather than one Congressman as provided for by A-3772. Although A-3772 joins Camden and Trenton resulting in a larger concentration of minorities (24.2% of the population) in a single district it, nevertheless, on balance works to deminish minority impact on congressional representatives on a statewide basis.

13. I have reviewed P.L. 1982 c.1, the present New Jersey Congressional Redistricting Plan, and believe that it effectively assures minority representation in two congressional districts, District 1 and District 4, and am further of the opinion that the joining of Camden and Trenton as proposed by A-3772 serves to diminish minority representation on the congressional level in central and southern New Jersey.

/s/ S. Howard Woodson, Jr.
S. HOWARD WOODSON, JR.

[Notarization Omitted in Printing]

DEFENDANTS' EXHIBIT NUMBER 5

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

STATEMENT OF JAMES TRUSSELL

JAMES TRUSSELL makes the following statement:

1. I am a demographer serving as a Faculty Associate at the Office of Population Research, Princeton University. I am also an Associate Professor of Economics and Public Affairs at Princeton University and I have been with the University since 1975. I have received degrees from several universities including a M. Phil. (1973) in Economics from Oxford University, and a Ph.D. (1975) in Economics from Princeton University.

2. I am a member of various professional organizations including the Population Association of America, the International Union for the Scientific Study of Population, and the American Statistical Association. I have authored over fifty (50) articles and publications dealing with the study of population generally, many of which concern the measurement of demographic variables. A copy of my Curriculum Vitae is attached as Exhibit 1 to this Affidavit.

3. A portion of my professional work, of late, has centered on evaluation of the 1930 Census program. I was a member of a National Academy of Sciences panel convened to study plans for the 1980 Census. A major part of the panel's work was determining whether the 1980 Census should be adjusted for estimated underenumeration. I was responsible for evaluating the methodology employed by the Census Bureau designed to estimate population undercount and authored that section of the report. The report is enclosed as Exhibit 2 to this Affidavit.

4. Only two methods (demographic and matching) have been proposed for estimating undercounts. These methods have been described and evaluated extensively in the literature including Exhibit 2. Demographic methods require formidable adjustment of raw data and numerous assumptions. The other method, based upon matching of the census records with independently devised population listings, has been employed extensively for measuring completeness of registration of births and deaths in developing countries with varying degrees of success. Each of these methods is described in greater detail below:

A. *Demographic Analysis*

5. Demographic analysis involves the comparison of the expected number of persons with the actual number enumerated. The expected number can be conceived as the number born minus the number who have died. The preliminary estimate then must be adjusted to account for those moving in or out of a geographic area. The expected number minus the actual count equals the net undernumeration estimate, which, in turn, reflects the difference between the gross overcount (due to duplicated records and to erroneous inclusions of persons not supposed to be counted) and the gross undercount. Demographic estimates are generally reliable for the native population in the United States, since one needs estimates for emigration, and not immigration. Estimates for the total population in the United States (natives and foreign-born), however, must rest upon assumptions about both immigration and emigration and therefore are less secure. Even though estimation of net migration for the United States is highly uncertain (since there is no monitoring system to record either emigration or illegal immigration), demographic analysis is thought to have yielded plausible estimates of the underenumeration of the entire population by sex, race, and age in 1970. U.S. Bureau of the Census. 1974. *1970 Census of Population*

and Housing: Evaluation and Research Program. Estimates of Coverage of Population by Sex, Race, and Age: Demographic Analysis. PHC(E)-4. Washington: Government Printing Office attached as Exhibit 3 to this Affidavit. No estimates of migration flows among states or smaller geographic or political units are available, however, so that the method used for obtaining national undercounts cannot be directly applied.

6. This demographic analysis also masks a host of problems. In practice, accurate records of births are available only since 1935; hence, straightforward demographic estimates (based on births, deaths, and estimates of net immigration) can be obtained only for the population under age 35 in 1970 (or under age 45 in 1980). Other procedures have to be used for those over 35 years of age. Medicare enrollments, after adjustment has been made for those legally unable to enroll and those who did not choose to enroll, provide a yardstick by which to measure the completeness of enumeration of those 65 and over. The middle group, aged 35-64 in 1970, poses particular problems since there exists no independent body of records with which to compare the census. The assumptions underlying the final estimates for this age group are, therefore, virtually untestable. The approximation for this group is based on estimates for the female population. The male population is then derived by applying expected "true" sex ratios. These sex ratios represent the estimated ratio of males to females at the census date on the basis of an historical series of virtually constant sex ratios at birth updated by survival rates for each sex calculated from an historical series of life tables and adjusted for net immigration.

7. Estimates of net immigration are also quite unreliable, and changes in assumptions are reflected on a one-for-one basis: if net immigration is assumed to rise by N, the estimated net undercount also rises by N. For example, the Census Bureau has recently concluded that

emigration between 1960 and 1970 previously had been underestimated by .6 million. Thus the revised preferred estimate of the 1970 undercount had to be adjusted downward by .6 million people. The Census Bureau estimates of net immigration also contain no allowance for illegal aliens. This uncertainty did not receive much attention in the 1970 undercount estimate. The situation, however, is quite different in 1980. The preliminary demographic estimate indicates an actual *overcount* in the United States population of four-tenths of one percent (.4%). Already many demographers have suggested that this estimate is so low because the Census Bureau uses too low a net immigration figure. If the net immigration figure is raised to account for a *presumed stock of illegal aliens counted in the census*, then the estimate of the undercount would be consequently raised. For example, in the best study to date, Lancaster and Sheuren have estimated that there were some 3.9 million resident illegal aliens aged 18 to 44 years of age in 1973. If this number is added to net immigration, the demographic estimate of the undercount would change significantly (from —.4 to 1.4%). Lancaster, Clarise and Frederick Scheuren. 1977. *Counting the Uncountable Illegals: Some Initial Statistical Speculations Employing Capture-Recapture Techniques*, presented at the 1977 Annual Meeting of the American Statistical Association attached as Exhibit 4 of this Affidavit.

8. A modified demographic analysis, similar in spirit to the national analysis, has been applied to states. U.S. Bureau of the Census. 1977. *Developmental Estimates of the Coverage of the Population of States in the 1970 Census: Demographic Analysis.* Current Population Reports, Series P-23: Special Studies, No. 65. Washington: Government Printing Office attached as Exhibit 5 to this Affidavit. The major change is necessitated for the estimates of undercounts for those under 35 years of age. By employing information on state of birth obtained from the census and information on births obtained directly

from birth registration, the number of persons who could be expected to list a particular state as a state of birth (the number born minus the number who should have died plus an adjustment for net overseas immigration) was compared with the number who actually reported that state. Differences were assumed to result from omission of persons from the census. However, such an analysis applies only to omission by state of birth, when what is desired is omission by state of residence. The assumptions needed to make this conversion render the estimates quite unreliable.

9. Reasonable alternative assumptions do produce rather different estimates for states. The method therefore must be judged to be technically weak where demographic analysis seeks to measure state rather than national undercounts. Furthermore, even if this modified method were sound for state measurement, it could not be applied to areas smaller than states since there are no available data on county and city of birth, upon which the estimates for age groups 0-34 and 35-64 are based. A further major limitation of any demographic method is that undercount estimates can be obtained for blacks and whites only; no estimates for Hispanics can be made since information on Spanish background is not contained in birth or death certificates.

B. *Matching Techniques*

10. Matching techniques used by the Census Bureau involve comparing a list of people enumerated in the census with a list thought to be more complete. In 1950, in selected sample areas, the Bureau conducted an intensive post-enumeration survey (PES). U.S. Bureau of the Census. 1960. *The Post-Enumeration Survey*: 1950. *An Evaluation Study of the 1950 Censuses of Population and Housing*. Technical Paper, No. 4. Washington: Government Printing Office. A match of the PES with the census indicated that about 1.4 percent of persons were

missed in the census. However, demographic analysis indicated a much higher undercount (3.4 percent). The Census Bureau suggested that "the deficiencies in the PES measurement of coverage error may be in considerable measure related to a segment of the population which would have such a tenuous attachment to a fixed place of residence that they are very difficult to enumerate by conventional census methods, and who for the same reason may be even more difficult to find in a reenumeration check carried out several months later by methods which, through more intensive, are essentially similar to those of the census."

11. For 1960, the Census Bureau therefore took a different approach. The census was matched to a list thought to be nearly complete. It included: (1) persons enumerated in the 1950 census or in the 1950 PES, and (2) persons born, and aliens entering the country, between 1950 and 1960. U.S. Bureau of the Census. 1964. *Evaluation and Research Program of the U.S. Censuses of Population and Housing, 1960: Record Check Studies of Population Coverage.* Series ER60, No. 2. Washington: Government Printing Office. From each of these groups a sample of persons was selected, yielding a working total of 7,187. Definite information about enumeration status could be obtained for only 6,003 (83.5 percent) sample persons. Of these, 1.3 percent were missed by the census. No determination could be made for the other 16.5 percent of the working sample, mostly because a substantial fraction (58 percent of these people could not be located in 1960. Hence, any match estimate is highly uncertain. If it is assumed that the residual 16.5 percent were as likely to have been enumerated as the other 83.5 percent, then the final match estimate would be 1.3 percent. Demographic analysis results in an undercount rate of 2.7 percent, so once again the matching technique produces an estimate only about half as large as the demographic technique.

12. In 1970, the census was matched to the Current Population Survey (CPS), and estimates of underenumeration were obtained. U.S. Bureau of the Census. 1974. *1970 Census of Population and Housing: Evaluation and Research Program. Estimate of Coverage of Population: Census-CPSI Match.* Unpublished study attached as Exhibit 6 to this Affidavit. The match estimates failed to show a higher underenumeration rate for males than for females even though this difference is firmly established by demographic analysis. The reason for the discrepancy is most likely to be the same as that offered after the 1950 effort; those persons who were missed in the census are more likely to be missed in the CPS. Although the match estimates are subject to bias of an unknown degree, it is interesting to examine those factors likely to be associated with the probability of being missed. As one might suspect, those with lower education or lower income have higher estimated undercount rates.

C. *Conclusion*

13. As stated earlier, the undercount in the 1980 Census is likely to be above one percent, once an estimate of the number of illegal aliens is explicitly included in the demographic equation. If the undercount were spread geographically in equal proportions, then any programs that depend only on the distributions of population and not the total size would be unaffected. An obvious example is redistricting, which would be unaffected if there were really two persons located in every place where one was counted. However, all the evidence to date indicates that all places are not undercounted to the same extent, since the undercount rate has been shown to depend on race, sex, age, income, and education.

14. The undercount for New Jersey in the 1980 Census is unknown, and no reliable methodology exists for estimating it. I see no reason to believe, however, that it is below the national average. The distribution of the

undercount in New Jersey is obviously also unknown, and I see no reason to believe that it would be uniformly spread over all municipalities. For these reasons, one cannot make congressional districts of truly equal size if one relies on census counts. Nor is it meaningful to rank one redistricting plan as superior to another when differences in district size are small. In my professional opinion, districts whose enumerated populations differ one from another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ James Trussell
JAMES TRUSSELL

Executed on: February 25, 1982

Exhibit 1

8/81

JAMES TRUSSELL

CURRENT POSITION

Associate Professor of Economics and Public Affairs; Faculty Associate, Office of Population Research, Princeton University.

PREVIOUS EXPERIENCE

Assistant Professor of Economics and Public Affairs; Faculty Associate, Office of Population Research, Princeton University, September 1978-June 1980.

Assistant Professor of Economics; Faculty Associate, Office of Population Research, Princeton University, September 1975-August 1978.

Research Associate, Office of Population Research; Lecturer, Department of Economics, Princeton University, December 1974-August 1975.

EDUCATION

Princeton University, Princeton, New Jersey; Ph.D. 1974 Economics.

Nuffield College, Oxford University, Oxford, England; B. Phil. 1973 Economics.

Davidson College, Davidson, North Carolina; B.S. *summa cum laude* 1971 Mathematics.

Columbus High School, Columbus, Georgia.

PERSONAL

Born October 17, 1949, Columbus, Georgia.

Social Security #257-86-0530

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21 Prospect Avenue
Princeton, NJ 08544
609/452-4946

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HONORS, AWARDS, AND ORGANIZATIONS

Phi Beta Kappa
Marshall Scholar
Watson Fellow
Population Council Fellow
Population Association of America
American Statistical Association
American Public Health Association
International Union for the Scientific Study of Population

PROFESSIONAL ACTIVITIES

Research Panels

National Academy of Sciences, Committee on National Statistics, Panel of the 1980 Census (1978).

National Academy of Sciences, Committee on National Statistics, Panel on Small Area Estimation (1979).

National Academy of Sciences, Committee on Population and Demography, Latin American Panel (1979).

Consulting

National Academy of Sciences, Committee on Population and Demography (1978+).

Emory University Family Planning Program (1977+).

Center for Disease Control, Family Planning Evaluation Division (1977+).

University Administration

Coordinator, Faculty Advising Committee for Major Fellowships (1977+).

Rhodes Scholarship Advisor (1976-1977).

Assistant Director of Graduate Studies, Department of Economics (1976-1977 and 1977-1978).

Policy Committee on Athletics and Physical Education (1978-1979).

Board of Advisors (Graduate Students), Woodrow Wilson School (1978-1979 and 1980-1982).

Committee on Admissions and Financial Aid (1980-1983).

Admissions Committee, Woodrow Wilson School (1978-1979 and 1980-1982).

REFERENCES

Ansley J. Coale, Professor of Economics, Office of Population Research, Princeton University.

Jane A. Menken, Professor of Sociology, Office of Population Research, Princeton University.

Richard E. Quandt, Professor of Economics, Department of Economics, Princeton University.

Joan S. Girgus, Dean of the College, Princeton University.

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"The Age of Slaves at Menarche and Their First Birth," with Richard Steckel. *Journal of Interdisciplinary History* VIII(3):477-505, Winter 1978.

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"Nutrition, Health, and Fertility," with Jane Menken and Susan Watkins.

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EXCERPTS FROM DEPOSITIONS

Deposition of Matthew Feldman

DIRECT EXAMINATION

BY MR. RAYMAR:

* * * *

[62] * * * Q Now, at the time you voted upon S-711, namely January 19, 1982, were you aware of other Congressional redistricting bills deviating less from zero population differences than S-711?

A This was .09. There may have been something as .5, something or other. But you have to take it, you just can't be a single issue individual. That's very important, the zero population. You also had to take in the other considerations.

It's only one, as far as I was concerned, three criteria.

* * * *

[67] Q Did you have any analysis done or do any analysis yourself of a bill introduced by Senator Gagliano known as S-3549?

A We were dealing with—there was a charade at times and good-naturedly votes were given to Gagliano's Bill. Not the 21 votes, but votes, and I had—I was one of those that supported it, and at the next meeting a few of us that supported it withdrew our vote.

Q Why did you consider that a charade?

A Well, you had to be there to appreciate what went on. There was tongue in cheek, a legislator was getting up and making speeches, talking about the Congressional redistricting. At times, especially late at night, it has been a proven history of the New Jersey State Legislature that you relax and the tension isn't there and so there is some degree of quote, unquote, "horseplay."

Q So that S-3549 got tongue-in-cheek treatment on the floor of the State Senate?

A I would say that they were very adamant in voting against—one time I remember the Republican legislators walked out when we were discussing some serious redistricting Bills. We even put a Republican Bill up on the board. It got some Democratic votes.

Q Was that S-3549?

[68] A It could have been. It could have been. I don't know.

Q But you specifically recall S-3549 getting tongue-in-cheek treatment?

A Yeah. I did support it to show I'm acting in good faith. He could have 21 votes, but my light went up early.

Q So you voted for S-3549; correct?

A Then I realized, after giving it some more thought, I didn't want my vote on that Bill because it really destroyed Bergen County.

Q And when you voted on the Bill, were you aware that the maximum deviation from zero was 0.1369 percent?

A I said it was—I didn't realize it was that low. As I said before, there were Bills that could have been lower.

Q I see.

A That's not our only standard.

• • • •

Deposition of Christopher J. Jackman

* * * *

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

* * * *

[35] Q Now, prior to you writing Professor Reock, did you discuss his plan with other members of either the Assembly or the State Senate?

A No, I didn't.

Q You did not?

A No.

Q After you wrote him, did you discuss his plan with any members of the State Assembly or State Senate?

A No, I did not, other than the news—the letter evidently was mentioned in discussion with other Assemblymen and in some cases they felt I was right.

Q When you say the letter was mentioned in some cases, did you send your letter to Dr. Reock to all of your colleagues in the Assembly and the State Senate?

A I believe I did.

* * * *

[52] Q Turning to page four, the second paragraph, in effect, the first full paragraph, "Congressional redistricting in New Jersey must also be viewed from the more broad-based national perspective."

Then, reading the entire paragraph, are these the considerations, Mr. Jackman, that went into your determination as to how to draw a Congressional redistricting plan?

MR. MARINARI: Objection.

MR. WALSH: Objection as to form. It's totally out of context, although—were those the only ones? Were they some?

I have no objection—

Q Were they some of the considerations?
A You're asking me to read that paragraph?
Q Yes.
A I say yes, some of the considerations.
Q Some of the considerations?
A Yes.

• • • •

Deposition of Alan J. Karcher

* * * *

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

* * * *

[25] Q What do you mean by "aspirational"?

A Aspirational, I mean in a sense that that is—not to be tortological about it, but that is what you are to aim at, what you are to aspire to, with the understanding that it is something that you should strive for, but be aware that the model goal, because of the reality of the process, normally can't be reached, and but that should be the beacon after which you, you know—I take that back. Strike "beacon." But it's the goal which you should pursue.

Q And is that goal to be pursued in accordance with B, C and D as you set it forth here?

A I think—

Q Here on Page 2?

A I think B, C and D both supplement and modify A, if you will.

Q What do you mean by "supplement and modify"?

A I thought you would ask that. By supplementary factors within the process that should be observed, but they modify it because of the fact that, and conditioned on the fact that model District D, the ideal district, will remain aspirational, normally, in essence, because of these factors having to also be respected.

[26] Q What do you mean by "these factors have to be respected," as well?

A That if you were going to set up—if you were going to only observe Factor A, that would be one—that would be one thing. But that in the process there should be some recognition, some cognizance, some sensitivity to these other factors.

Q Including what you set forth here in B, C and D on the top of Page 2 of your statement?

A That's correct, yes.

* * * *

JOINT EXHIBIT NO. 4

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF SAMUEL A. ALITO

SAMUEL A. ALITO, being duly sworn, deposes and says:

1. I am the Executive Director of the Office of Legislative Services of the New Jersey Legislature. Before assuming this position in May 19, 1981, I was the Director of the Division of Legislative Information and Research in the Office of Legislative Services since 1963.

2. The Office of Legislative Services is a non-partisan agency of the Legislature, which provides technical assistance to the Legislature and its members in the areas of information, research, bill-drafting, legal issues, budget and fiscal matters as well as conducting post-audits of all State agencies.

3. Neither I nor my office played any role in the enactment of the Congressional redistricting bill signed by Governor Byrne on January 19, 1982 (Laws 1982, c. 1). Upon request, however, we are able to determine the population deviations and other variables of any Congressional redistricting plan.

4. Legislative members of the Republican Party, on behalf of the party plaintiffs, requested that the following information and data be obtained for certain redistricting bills introduced in the Legislature following the official 1980 federal decennial census (hereafter referred to as the 1980 census):

a. The sponsor of the bill;

b. The date the bill was proposed for introduction and its date of introduction;

c. The number of county fragments in the bill;

d. The number of paired incumbents in the bill;

e. The average district population for the bill;

f. The highest district population for the bill;

g. The lowest district population for the bill;

h. The range of population for the bill;

i. The population for each Congressional district in the bill;

j. The absolute population deviation for each Congressional district in the bill;

k. The relative population deviation for each Congressional district in the bill; and

l. The relative overall range for each bill.

5. The definition for each enumerated request listed in paragraph 4 is as follows:

a. "Sponsor" means the first-listed legislator introducing the bill and endorsing his signature thereon.

b. "Date proposed for introduction" means the calendar date on which the bill was presented to the Secretary of the Senate or Clerk of the General Assembly for introduction. The "date of introduction" means the calendar date on which the bill received first reading.

c. "The number of county fragments" is obtained by determining the number of whole counties and parts of counties contained in each Congressional district and then totalling the fragments of all the 14 districts.

d. "The number of paired incumbents" means the number of districts in which two incumbent Congressmen reside.

e. "The average district population" means the sum of the 14 district populations divided by 14.

f. "Highest district population" means the population of the most populous district.

g. "Lowest district population" means the population of the least populous district.

h. "Range of population" means the lowest district population subtracted from the highest district population.

i. "Population for each Congressional district" means the population for each Congressional district according to the 1980 census figures.

j. "Absolute population deviation for each Congressional district" means the difference between the district population and the average district population.

k. "Relative population deviation for each Congressional district" means the absolute population deviation divided by the average district population and expressed as a percent.

l. "Relative overall range" means the range of population divided by the average district population and expressed as a percent.

6. Pursuant to the legislative request in paragraph 4, I directed employees of the Office of Legislative Services to obtain the necessary information and data.

7. Where it was necessary or expedient to perform mathematical calculations a computer was used. The population data are based on the 1980 census.

8. The information and data requested in paragraph 4 are found in the Appendix A, which is attached hereto and made a part hereof.

9. Legislative members of the Republican Party, on behalf of the party plaintiffs, also requested racial population data for those districts which contain the city of

Newark for all the redistricting bills introduced in the Legislature.

10. Pursuant to the legislative request in paragraph 9, I directed employees of the Office of Legislative Services to obtain that data.

11. This data is found in the Appendix B, which is attached hereto and made a part hereof.

12. Legislative members of the Republican Party on behalf of the party plaintiffs also requested population adjustments for East Orange for various bills.

13. Pursuant to the legislative request in paragraph 12, I directed the employees of the Office of Legislative Services to obtain the population adjustments.

14. The data concerning the population adjustments is found in Appendix C, which is attached hereto and made a part hereof.

/s/ Samuel A. Alito
SAMUEL A. ALITO

[Notarization Omitted in Printing]

Appendix A

DATA SHEET

	Sponsor	Date Proposed	Date Introduced	Frag-ments	Paired Incumbents
P.L. 1982, c.1	Feldman	—	1-12-82	55	1
1970's Plan	Turner	—	—	42	—
A-3776	Kavanaugh	12-17-81	12-17-81	50	1
S-3547	DiFrancesco	1-4-82	1-4-82	48	1
A-3794	Bennett	1-4-82	1-7-82	38	1
S-3549	Gagliano	1-4-82	1-4-82	38	1
A-3646	Kern	11-16-81	11-23-81	44	1
S-3328	Hagedorn	6-22-81	6-22-81	44	1
A-3767	Kern	12-17-81	1-4-82	46	1
S-3538	Hagedorn	12-17-81	1-4-82	46	1
A-614	Bennett	1-18-82	2-1-82	39	1
A-615	Kavanaugh	1-18-82	2-1-82	44	1
A-3817	Hardwick	1-11-82	1-12-82	45	1

A = Assembly; S = Senate

SUMMARY PAGE

P.L. 1982, C.1

	Population 1980
Average	526,059
Highest	527,472
Lowest	523,798
Range	3,674
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	526,057	−2	−.000380
2. Cong. District 2	526,279	220	.041820
3. Cong. District 3	524,825	−1,234	−.234574
4. Cong. District 4	527,472	1,413	.268601
5. Cong. District 5	526,367	308	.058549
6. Cong. District 6	523,798	−2,261	−.429800
7. Cong. District 7	525,563	−496	−.094286
8. Cong. District 8	526,138	79	.015017
9. Cong. District 9	527,349	1,290	.245220
10. Cong. District 10	525,832	−227	−.043151
11. Cong. District 11	525,290	−769	−.146181
12. Cong. District 12	526,907	848	.161199
13. Cong. District 13	526,168	109	.020720
14. Cong. District 14	526,778	719	.136677
	7,364,823		

Overall Range

0.6984007497

SUMMARY PAGE

1970 PLAN

	Papulation 1970
Average	478,074
Highest	478,542
Lowest	477,730
Range	812
Total	7,171,112

	Population 1970	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	478,002	−72	−.015060
2. Cong. District 2	478,126	52	.010877
3. Cong. District 3	478,069	−5	−.001046
4. Cong. District 4	478,221	147	.030748
5. Cong. District 5	477,789	−285	−.059614
6. Cong. District 6	478,109	35	.007321
7. Cong. District 7	478,157	83	.017361
8. Cong. District 8	478,444	370	.077394
9. Cong. District 9	478,098	24	.005020
10. Cong. District 10	477,730	−344	−.071955
11. Cong. District 11	478,542	468	.097893
12. Cong. District 12	477,887	−187	−.039115
13. Cong. District 13	478,245	171	.035769
14. Cong. District 14	477,744	−330	−.069027
15. Cong. District 15	477,949	−125	−.026147
	7,171,112		

Overall Range

0.1698481825

SUMMARY PAGE

A3776

	Population 1980
Average	526,059
Highest	526,788
Lowest	524,957
Range	1,831
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	526,029	−30	−.005703
2. Cong. District 2	526,082	23	.004372
3. Cong. District 3	526,016	−43	−.008174
4. Cong. District 4	526,018	−41	−.007794
5. Cong. District 5	525,777	−282	−.053606
6. Cong. District 6	526,056	−3	−.000570
7. Cong. District 7	526,788	729	.138578
8. Cong. District 8	526,711	652	.123940
9. Cong. District 9	525,947	−112	−.021290
10. Cong. District 10	526,151	92	.017489
11. Cong. District 11	526,175	116	.022051
12. Cong. District 12	525,974	−85	−.016158
13. Cong. District 13	524,957	−1,102	−.209482
14. Cong. District 14	526,142	83	.015778
	7,364,823		

Rel. Overall Range

0.3461588909

SUMMARY PAGE

S3457

	Population 1980
Average	526,059
Highest	526,603
Lowest	526,944
Range	659
Total	7,364,823

	Population 1980	Absolute Population Deviation	Population Relative Deviation
1. Cong. District 1	526,038	−21	−.003992
2. Cong. District 2	526,082	23	.004372
3. Cong. District 3	526,016	−43	−.008174
4. Cong. District 4	526,053	−6	−.001141
5. Cong. District 5	526,014	−45	−.008554
6. Cong. District 6	526,047	−12	−.002281
7. Cong. District 7	526,032	−27	−.005133
8. Cong. District 8	526,031	−28	−.005323
9. Cong. District 9	525,944	−115	−.021861
10. Cong. District 10	526,603	544	.103410
11. Cong. District 11	526,007	−52	−.009885
12. Cong. District 12	525,953	−106	−.020150
13. Cong. District 13	525,954	−105	−.019960
14. Cong. District 14	526,049	−10	−.001901
	7,364,823		

Rel. Overall Range

0.1252711198

SUMMARY PAGE

A3794 *

* Only 20 of 21 counties in New Jersey were delineated in this bill. Hunterdon County, containing 26 municipalities, was not included. The absence of all 21 counties and 567 municipalities makes it impossible to compile a complete table of population deviations.

SUMMARY PAGE

S3549 *

* Only 20 of 21 counties in New Jersey were delineated in this bill. Hunterdon County, containing 26 municipalities, was not included. The absence of all 21 counties and 567 municipalities makes it impossible to compile a complete table of population deviations.

SUMMARY PAGE

A3646 AND S3328

	Population 1980
Average	526,059
Highest	526,770
Lowest	525,739
Range	1,031
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,972	−87	−.016538
2. Cong. District 2	525,909	−150	−.028514
3. Cong. District 3	526,003	−56	−.010645
4. Cong. District 4	526,249	190	.036118
5. Cong. District 5	525,944	−115	−.021861
6. Cong. District 6	525,996	−63	−.011976
7. Cong. District 7	525,970	−89	−.016918
8. Cong. District 8	526,770	711	.135156
9. Cong. District 9	526,199	140	.026613
10. Cong. District 10	526,140	81	.015398
11. Cong. District 11	525,739	−320	−.060830
12. Cong. District 12	525,827	−232	−.044102
13. Cong. District 13	526,056	−3	−.000570
14. Cong. District 14	526,049	−10	−.001901
	7,364,823		

Rel. Overall Range

0.195986214

SUMMARY PAGE

A614

	Population 1980
Average	526,059
Highest	526,507
Lowest	525,787
Range	720
Total	7,364,823

	Poplation 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,914	−145	−.027563
2. Cong. District 2	526,046	−13	−.002471
3. Cong. District 3	526,245	186	.035357
4. Cong. District 4	525,887	−172	−.032696
5. Cong. District 5	525,872	−187	−.035547
6. Cong. District 6	526,144	85	.016158
7. Cong. District 7	525,833	−226	−.042961
8. Cong. District 8	525,787	−272	−.051705
9. Cong. District 9	525,982	−77	−.014637
10. Cong. District 10	526,186	127	.024142
11. Cong. District 11	526,175	116	.022051
12. Cong. District 12	526,507	448	.085162
13. Cong. District 13	526,007	−52	−.009885
14. Cong. District 14	526,238	179	.034027
	7,364,823		

Overall Range

0.1368667773

SUMMARY REPORT

A3817

	Population 1980
Average	526,059
Highest	527,673
Lowest	525,298
Range	2,375
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,784	−275	−.052276
2. Cong. District 2	525,915	−144	−.027373
3. Cong. District 3	525,909	−150	−.028514
4. Cong. District 4	525,673	−386	−.073376
5. Cong. District 5	526,182	123	.023381
6. Cong. District 6	526,054	−5	−.000950
7. Cong. District 7	526,283	224	.042581
8. Cong. District 8	526,337	278	.052846
9. Cong. District 9	525,726	−333	−.063301
10. Cong. District 10	527,673	1,614	.306810
11. Cong. District 11	525,298	−761	−.144661
12. Cong. District 12	526,464	405	.076988
13. Cong. District 13	526,189	130	.024712
14. Cong. District 14	525,336	−723	−.137437
	7,364,823		

Rel. Overall Range

0.4514702723

Appendix B

DISTRICT 10

A3574, A3772, A3795, A3809, A3817

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
3. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
4. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
5. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
6. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
	527,673	184,278	34.92	299,227	56.70	72,830	13.80

S879, S3549, A614, A3794

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
3. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
6. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
7. Kearny Town	35,735	34,821	97.44	79	.22	3,214	8.99
	526,186	202,474	38.47	280,017	53.21	74,571	14.17

S880, A613

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
3. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
6. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
7. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
	525,209	182,049	34.66	299,343	56.99	70,929	13.50

C.V. OF S3518, S3519, A3815

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	191,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Union Twp	50,184	45,229	90.13	4,297	8.56	876	1.75
6. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
7. Springfield Twp	13,955	13,395	95.99	395	2.83	170	1.22
	525,576	199,321	37.94	285,291	54.28	67,736	12.88

S3518, S3527, S3560, S3561, S3562, S710, S711, A3813, A3814, A3816, A604, A605

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Glen Ridge Bor	7,835	7,516	95.68	135	1.72	134	1.71
4. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
5. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
6. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	525,832	194,020	36.89	287,903	54.75	72,519	13.79

A3807

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
6. Union Twp	50,184	45,229	90.13	4,297	8.56	876	1.75
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	523,863	197,492	37.69	284,924	54.38	70,081	13.37

S3328, S3538, S770, A3646, A3732, A3767, A611

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Lyndhurst Twp	20,326	20,016	98.47	8	.04	482	2.37
2. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
3. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Clifton City	74,388	72,670	97.69	360	.48	1,542	2.07
6. Passaic City	52,463	32,210	61.40	10,364	19.75	17,933	34.18
	526,140	273,213	51.92	203,742	38.72	82,740	15.72

A3286

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Belleville Town	35,367	33,263	94.05	815	2.30	1,382	3.91
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. Nutley Town	28,998	27,758	95.72	483	1.67	499	1.72
6. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
7. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
	526,158	206,981	39.33	277,235	52.69	67,149	12.76

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A3554

	Population 1980	White	White Pct	Black	Black Pct	Spanish	Spanish Pct
1. Belleville Town	35,367	33,263	94.05	815	2.30	1,382	3.91
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
4. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
5. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
6. West Orange Town	39,510	37,400	94.66	967	2.45	591	1.50
	528,815	209,107	39.54	277,584	52.49	67,107	12.69

S3548, S878, A3792, A615, A646

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
4. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
5. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
6. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
	526,001	201,166	38.24	281,168	53.45	69,891	13.28

S3525, A3776

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
5. Bayonne City	65,047	60,892	93.61	2,677	4.12	3,648	5.61
6. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	526,151	238,670	45.36	243,640	46.30	74,009	14.06

S3353

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Belleville Town	35,367	33,263	94.05	815	2.30	1,382	3.91
2. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
3. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
4. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
5. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
6. Nutley Town	28,998	27,758	95.72	483	1.67	499	1.72
	526,950	226,098	42.90	259,060	49.16	66,111	12.64

A3573

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
5. West Orange Town	39,510	37,400	94.66	967	2.45	591	1.50
6. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	527,130	201,720	38.26	283,178	53.72	69,599	13.20

S3547

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Maplewood Twp	22,950	21,636	94.27	1,003	4.37	385	1.68
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
6. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
7. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
	526,603	206,980	39.30	278,072	52.80	67,048	12.73

S3526, S3531, S3563, A3780

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Union Twp	50,184	45,229	90.13	4,297	8.56	876	1.75
6. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
7. Springfield Twp	13,955	13,395	95.99	395	2.83	170	1.22
	525,576	199,321	37.94	285,291	54.28	67,736	12.58

Appendix C

Using population figures from the official decennial census of the United States for New Jersey as reported in March 1981 and before the revisions certified on October 30, 1981, the relative and absolute overall ranges of the following bills are:

Bill	Relative Overall Range	Absolute Overall Range
S-3547	0.03 percent	144
S-3328	0.10 percent	510
A-3646	0.10 percent	510
S-3538	0.07 percent	360
A-3767	0.07 percent	360
A-3817	0.33 percent	1,710

JOINT EXHIBIT NO. 5

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF SAMUEL A. ALITO

SAMUEL A. ALITO, being duly sworn, deposes and says:

1. I am the Executive Director of the Office of Legislative Services of the New Jersey Legislature. Before assuming this position in May 19, 1981, I was the Director of the Division of Legislative Information and Research in the Office of Legislative Services since 1963.

2. The Office of Legislative Services is a non-partisan agency of the Legislature, which provides technical assistance to the Legislature and its members in the areas of information, research, bill-drafting, legal issues, budget and fiscal matters as well as conducting post-audits of all State agencies.

3. This office, upon request, is able to determine the population deviations and other variables of any Congressional redistricting plan.

4. Legislative members of the Republican Party, on behalf of the party plaintiffs, requested that this office provide a table of population deviations for A.3794 and S.3549, two redistricting bills introduced in 1981, assuming that Hunterdon County is placed in District 5. The definitions of the various deviation terms and the methodology used to obtain the deviations are defined in another affidavit attested to by me. To the extent necessary the definitions and methodology described in that affidavit are incorporated by reference into the instant affidavit and made a part hereof. All population data are based on the 1980 census statistics.

5. Pursuant to the legislative request in paragraph 4, I directed employees of the Office of Legislative Services to obtain the necessary information and data.

6. The information and data requested in paragraph 4 are found in Appendix A, which is attached hereto and made a part hereof.

/s/ Samuel A. Alito
SAMUEL A. ALITO

[Notarization Omitted in Printing]

Appendix A

SUMMARY PAGE

A3794 AND S3549

With Hunterdon County placed in fifth District.

	Population 1980
Average	526,059
Highest	526,507
Lowest	525,787
Range	720
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,914	−145	−.027563
2. Cong. District 2	526,046	−13	−.002471
3. Cong. District 3	526,245	186	.035357
4. Cong. District 4	525,887	−172	−.032696
5. Cong. District 5	525,891	−168	−.031936
6. Cong. District 6	526,144	85	.016158
7. Cong. District 7	525,833	−226	−.042961
8. Cong. District 8	525,787	−272	−.051705
9. Cong. District 9	525,982	−77	−.014637
10. Cong. District 10	526,186	127	.024142
11. Cong. District 11	526,175	116	.022051
12. Cong. District 12	526,507	448	.085162
13. Cong. District 13	525,988	−71	−.013497
14. Cong. District 14	526,238	179	.034027
	7,364,823		

Rel. Overall Range

0.1368667773

JOINT EXHIBIT NO. 6

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF SAMUEL A. ALITO

SAMUEL A. ALITO, being duly sworn, deposes and says:

1. I am the Executive Director of the Office of Legislative Services of the New Jersey Legislature. Before assuming this position in May 19, 1981, I was the Director of the Division of Legislative Information and Research in the Office of Legislative Services since 1963.

2. The Office of Legislative Services is a non-partisan agency of the Legislature, which provides technical assistance to the Legislature and its members in the areas of information, research, bill-drafting, legal issues, budget and fiscal matters as well as conducting post-audits of all State agencies.

3. The legislative members of the Democratic Party, on behalf of the party defendants, requested that this office review A.3772 of 1981, a redistricting bill, to ascertain whether the municipality of Magnolia is contiguous with the sixth district as described in that bill.

4. Pursuant to the legislative request in paragraph 3, I directed an employee of the Office of Legislative Services to make that determination.

5. The employee constructed a map for the first and sixth districts as described in A.3772 and it was determined that the municipality of Magnolia was not contiguous with the sixth district as described in that bill.

/s/ Samuel A. Alito
SAMUEL A. ALITO

[Notarization Omitted in Printing]

JOINT EXHIBIT NO. 7

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

AFFIDAVIT OF SAMUEL A. ALITO

SAMUEL A. ALITO, being duly sworn, deposes and says:

1. I am the Executive Director of the Office of Legislative Services of the New Jersey Legislature. Before assuming this position in May 19, 1981, I was the Director of the Division of Legislative Information and Research in the Office of Legislative Services since 1963.

2. The Office of Legislative Services is a non-partisan agency of the Legislature, which provides technical assistance to the Legislature and its members in the areas of information, research, bill-drafting, legal issues, budget and fiscal matters as well as conducting post-audits of all State agencies.

3. Neither I nor my office played any role in the enactment of the Congressional redistricting bill signed by Governor Byrne on January 19, 1982 (Laws 1982, c. 1). Upon request, however, we are able to determine the population deviations and other variables of any Congressional redistricting plan.

4. Legislative members of the Democratic Party, on behalf of the party defendants, requested that the following information and data be obtained for certain redistricting bills introduced in the Legislature following the official 1980 federal decennial census (hereafter referred to as the 1980 census):

a. The sponsor of the bill;

b. The date of introduction of the bill;

c. The number of county fragments in the bill;

d. The number of paired incumbents in the bill;

e. The average district population for the bill;

f. The highest district population for the bill;

g. The lowest district population for the bill;

h. The range of population for the bill;

i. The population for each Congressional district in the bill;

j. The absolute population deviation for each Congressional district in the bill;

k. The relative population deviation for each Congressional district in the bill; and

l. The relative overall range for each bill.

5. The definition for each enumerated request listed in paragraph 4 is as follows:

a. "Sponsor" means the first-listed legislator introducing the bill and endorsing his signature thereon.

b. "The date of introduction" means the calendar date on which the bill received first reading.

c. "The number of county fragments" is obtained by determining the number of whole counties and parts of counties contained in each Congressional district and then totalling the fragments of all the 14 districts.

d. "The number of paired incumbents" means the number of districts in which two incumbent Congressmen reside.

e. "The average district population" means the sum of the 14 district populations divided by 14.

f. "Highest district population" means the population of the most populous district.

g. "Lowest district population" means the population of the least populous district.

h. "Range of population" means the lowest district population subtracted from the highest district population.

i. "Population for each Congressional district" means the population for each Congressional district according to the 1980 census figures.

j. "Absolute population deviation for each Congressional district" means the difference between the district population and the average district population.

k. "Relative population deviation for each Congressional district" means the absolute population deviation divided by the average district population and expressed as a percent.

l. "Relative overall range" means the range of population divided by the average district population and expressed as a percent.

6. Pursuant to the legislative request in paragraph 4, I directed employees of the Office of Legislative Services to obtain the necessary information and data.

7. Where it was necessary or expedient to perform mathematical calculations a computer was used. The population data are based on the 1980 census.

8. The information and data requested in paragraph 4 are found in the Appendix A, which is attached hereto and made a part hereof.

9. Legislative members of the Democratic Party, on behalf of the party defendants, also requested racial population data for those districts which contain the city of Newark for all the redistricting bills introduced in the Legislature.

10. Pursuant to the legislative request in paragraph 9, I directed employees of the Office of Legislative Services to obtain that data.

11. This data is found in the Appendix B, which is attached hereto and made a part hereof.

/s/ Samuel A. Alito
SAMUEL A. ALITO

[Notarization Omitted in Printing]

Appendix A

DATA SHEET

	Sponsor	Date Introduced	Fragments	Paired Incumbents
P.L. 1982, c.1	Feldman	1-12-82	55	3
1970's Plan	Turner	—	42	—
A-3776	Kavanaugh	12-17-81	50	1
S-3525	Parker	12-14-81	50	1
S-3547	DiFrancesco	1-4-82	48	1
A-3792	Saxton	1-7-82	46	1
S-3548	Dorsey	1-4-82	46	1
A-3573	Hardwick	6-25-81	47	2
A-3794	Bennett	1-7-82	38	1
S-3549	Gagliano	1-4-82	38	1
A-3646	Kern	11-23-81	44	1
S-3328	Hagedorn	6-22-81	44	1
A-3767	Kern	1-4-82	46	1
S-3538	Hagedorn	1-4-82	46	1
A-614	Bennett	2-1-82	39	1
A-615	Kavanaugh	2-1-82	44	1
A-3817	Hardwick	1-12-82	45	1
A-3772	D. Gallo	12-17-81	53	1

A = Assembly; S = Senate

SUMMARY PAGE

P.L. 1982, C.1.

	Population 1980
Average	526,059
Highest	527,472
Lowest	523,798
Range	3,674
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	526,057	−2	−.000380
2. Cong. District 2	526,279	220	.041820
3. Cong. District 3	524,825	−1,234	−.234574
4. Cong. District 4	527,472	1,413	.268601
5. Cong. District 5	526,367	308	.058549
6. Cong. District 6	523,798	−2,261	−.429800
7. Cong. District 7	525,563	−496	−.094286
8. Cong. District 8	526,138	79	.015017
9. Cong. District 9	527,394	1,290	.245220
10. Cong. District 10	525,832	−227	−.043151
11. Cong. District 11	525,290	−769	−.146181
12. Cong. District 12	526,907	848	.161199
13. Cong. District 13	526,168	109	.020720
14. Cong. District 14	526,778	719	.136677
	7,364,823		

Overall Range

0.6984007497

SUMMARY PAGE

1970 PLAN

	Population 1970
Average	478,078
Highest	478,542
Lowest	477,730
Range	812
Total	7,171,112

	Population 1970	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	478,002	−72	−.015060
2. Cong. District 2	478,126	52	.010877
3. Cong. District 3	478,069	−5	−.001046
4. Cong. District 4	478,221	147	.030748
5. Cong. District 5	477,789	−285	−.059614
6. Cong. District 6	478,109	35	.007321
7. Cong. District 7	478,157	83	.017361
8. Cong. District 8	478,444	370	.077394
9. Cong. District 9	478,098	24	.005020
10. Cong. District 10	477,730	−344	−.071955
11. Cong. District 11	478,542	468	.097893
12. Cong. District 12	477,887	−187	−.039115
13. Cong. District 13	478,245	171	.035769
14. Cong. District 14	477,744	−330	−.069027
15. Cong. District 15	477,949	−125	−.026147
	7,171,112		

Rel. Overall Range

.1698481825

SUMMARY PAGE

A3776

	Population 1980
Average	526,059
Highest	526,788
Lowest	524,957
Range	1,831
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	526,029	−30	−.005703
2. Cong. District 2	526,082	23	.004372
3. Cong. District 3	526,016	−43	−.008174
4. Cong. District 4	526,018	−41	−.007794
5. Cong. District 5	525,777	−282	−.053606
6. Cong. District 6	526,056	−3	−.000570
7. Cong. District 7	526,788	729	.138578
8. Cong. District 8	526,711	652	.123940
9. Cong. District 9	525,947	−112	−.021290
10. Cong. District 10	526,151	92	.017489
11. Cong. District 11	526,175	116	.022051
12. Cong. District 12	525,974	−85	−.016158
13. Cong. District 13	524,957	−1,102	−.209482
14. Cong. District 14	526,142	83	.015778
	7,364,823		

Rel. Overall Range

.3461588908

SUMMARY PAGE

S3525 *

* Only 566 out of 567 municipalities in New Jersey were delineated in this bill. Sea Bright in Monmouth County was not included. The absence of all 567 municipalities makes it impossible to compile a complete table of population deviations.

SUMMARY PAGE

S3547

	Population 1980
Average	526,059
Highest	526,603
Lowest	525,944
Range	659
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	526,038	−21	−.003992
2. Cong. District 2	526,082	23	.004372
3. Cong. District 3	526,016	−43	−.008174
4. Cong. District 4	526,053	−6	−.001141
5. Cong. District 5	526,014	−45	−.008554
6. Cong. District 6	526,047	−12	−.002281
7. Cong. District 7	526,032	−27	−.005133
8. Cong. District 8	526,031	−28	−.005323
9. Cong. District 9	525,944	−115	−.021861
10. Cong. District 10	526,603	544	.103410
11. Cong. District 11	526,007	−52	−.009885
12. Cong. District 12	525,953	−106	−.020150
13. Cong. District 13	525,954	−105	−.019960
14. Cong. District 14	526,049	−10	−.001901
	7,364,823		

Rel. Overall Range

0.1252711198

SUMMARY PAGE

S3548 AND A3792

	Population 1980
Average	526,059
Highest	544,160
Lowest	508,079
Range	36,081
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	508,079	−17,980	−3.417868
2. Cong. District 2	544,160	18,101	3.440869
3. Cong. District 3	526,016	−43	−.008174
4. Cong. District 4	526,040	−19	−.003612
5. Cong. District 5	526,009	−50	−.009505
6. Cong. District 6	525,941	−118	−.022431
7. Cong. District 7	528,047	1,988	.377904
8. Cong. District 8	526,105	46	.008744
9. Cong. District 9	524,163	−1,896	−.360416
10. Cong. District 10	526,001	−58	−.011025
11. Cong. District 11	526,007	−52	−.009885
12. Cong. District 12	526,111	52	.009885
13. Cong. District 13	525,995	−64	−.012166
14. Cong. District 14	526,149	90	.017108
	7,364,823		

Rel. Overall Range

6.858736377

SUMMARY PAGE

A3573

	Population 1980
Average	526,059
Highest	535,167
Lowest	517,894
Range	17,273
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,810	−249	−.047333
2. Cong. District 2	526,468	409	.077748
3. Cong. District 3	526,010	−49	−.009315
4. Cong. District 4	526,319	260	.049424
5. Cong. District 5	525,816	−243	−.046193
6. Cong. District 6	526,267	208	.039539
7. Cong. District 7	535,167	9,108	1.731365
8. Cong. District 8	525,888	−171	−.032506
9. Cong. District 9	517,894	−8,165	−1.552107
10. Cong. District 10	527,130	1,071	.203589
11. Cong. District 11	525,547	−512	−.097327
12. Cong. District 12	525,885	−174	−.033076
13. Cong. District 13	525,286	−773	−.146942
14. Cong. District 14	525,336	−723	−.137437
	7,364,823		

Rel. Overall Range

3.283472006

SUMMARY PAGE

A3734 *

* Only 20 of 21 counties in New Jersey were delineated in this bill. Hunterdon County, containing 26 municipalities, was not included. The absence of all 21 counties and 567 municipalities makes it impossible to compile a complete table of population deviations.

SUMMARY PAGE

S3549 *

* Only 20 of 21 counties in New Jersey were delineated in this bill. Hunterdon County, containing 26 municipalities, was not included. The absence of all 21 counties and 567 municipalities makes it impossible to compile a complete table of population deviations.

SUMMARY PAGE

A3646 AND S3328

	Population 1980
Average	526,059
Highest	526,770
Lowest	525,739
Range	1,031
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,972	−87	−.016538
2. Cong. District 2	525,909	−150	−.028514
3. Cong. District 3	526,003	−56	−.010645
4. Cong. District 4	526,249	190	.036118
5. Cong. District 5	525,944	−115	−.021861
6. Cong. District 6	525,996	−63	−.011976
7. Cong. District 7	525,970	−89	−.016918
8. Cong. District 8	526,770	711	.135156
9. Cong. District 9	526,199	140	.026613
10. Cong. District 10	526,140	81	.015398
11. Cong. District 11	525,739	−320	−.060830
12. Cong. District 12	525,827	−232	−.044102
13. Cong. District 13	526,056	−3	−.000570
14. Cong. District 14	526,049	−10	−.001901
	7,364,823		

Rel. Overall Range

0.1959856214

SUMMARY PAGE

A3767 *

* Bass River, Tabernacle and Woodland in Burlington County are included in the 2nd and 6th congressional districts by virtue of the language contained in page 2, section 2, lines 51 and 52. The duplication contained in the bill would result in more than the 567 municipalities in New Jersey making it impossible to compile a complete table of population deviations.

SUMMARY PAGE

S3538 *

* Bass River, Tabernacle and Woodland in Burlington County are included in the 2nd and 6th congressional districts by virtue of the language contained on page 2, section 2, lines 51 and 52. The duplication contained in the bill would result in more than the 567 municipalities in New Jersey making it impossible to compile a complete table of population deviations.

SUMMARY PAGE

A614

	Population 1980
Average	526,059
Highest	526,507
Lowest	525,787
Range	720
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,914	−145	−.027563
2. Cong. District 2	526,046	−13	−.002471
3. Cong. District 3	526,245	186	.035357
4. Cong. District 4	525,887	−172	−.032696
5. Cong. District 5	525,372	−187	−.035547
6. Cong. District 6	526,144	85	.016158
7. Cong. District 7	525,833	−226	−.042961
8. Cong. District 8	525,787	−272	−.051705
9. Cong. District 9	525,982	−77	−.014637
10. Cong. District 10	526,186	127	.024142
11. Cong. District 11	526,175	116	.022051
12. Cong. District 12	526,507	448	.085162
13. Cong. District 13	526,007	−52	−.009885
14. Cong. District 14	526,238	179	.034027
	7,364,823		

Overall Range

0.1368667773

SUMMARY PAGE

A615

	Population 1980
Average	526,059
Highest	526,149
Lowest	525,995
Range	154
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	526,029	−30	−.005703
2. Cong. District 2	526,082	23	.004372
3. Cong. District 3	526,016	−43	−.008174
4. Cong. District 4	526,053	−6	−.001141
5. Cong. District 5	526,009	−50	−.009505
6. Cong. District 6	526,056	−3	−.000570
7. Cong. District 7	526,090	31	.005893
8. Cong. District 8	526,105	46	.008744
9. Cong. District 9	526,120	61	.011596
10. Cong. District 10	526,001	−58	−.011025
11. Cong. District 11	526,007	−52	−.009885
12. Cong. District 12	526,111	52	.009885
13. Cong. District 13	525,995	−64	−.012166
14. Cong. District 14	526,149	90	.017108
	7,364,823		

Overall Range

0.02927428292

SUMMARY REPORT

A3817

	Population 1980
Average	526,059
Highest	527,673
Lowest	525,298
Range	2,375
Total	7,364,823

	Population 1980	Absolute Population Deviation	Relative Population Deviation
1. Cong. District 1	525,784	−275	−.052276
2. Cong. District 2	525,915	−144	−.027373
3. Cong. District 3	525,909	−150	−.028514
4. Cong. District 4	525,673	−386	−.073376
5. Cong. District 5	526,182	123	.023381
6. Cong. District 6	526,054	−5	−.000950
7. Cong. District 7	526,283	224	.042581
8. Cong. District 8	526,337	278	.052846
9. Cong. District 9	525,726	−333	−.063301
10. Cong. District 10	527,673	1,614	.306810
11. Cong. District 11	525,298	−761	−.144661
12. Cong. District 12	526,464	405	.076988
13. Cong. District 13	526,189	130	.024712
14. Cong. District 14	525,336	−723	−.137437
	7,364,823		

Rel. Overall Range

0.4514702723

SUMMARY PAGE

A3772 *

* Only 566 out of 567 municipalities in New Jersey were delineated in this bill. Monroe Township in Gloucester County was not included. The absence of all 567 municipalities makes it impossible to compile a complete table of population deviations.

Appendix B

DISTRICT 10

A3574, A3772, A3795, A3809, A3817

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
3. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
4. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
5. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
6. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
	527,673	184,278	34.92	299,227	56.70	72,830	13.80

S879, S3549, A614, A3794

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
3. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
6. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
7. Kearny Town	35,735	34,821	97.44	79	.22	3,214	8.99
	526,186	202,474	38.47	280,017	53.21	74,571	14.17

S880, A613

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
3. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
6. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
7. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
	525,209	182,049	34.66	299,343	56.99	70,929	13.50

C.V. OF S3518, S3519, A3815

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	191,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Union Twp	50,184	45,229	90.13	4,297	8.56	876	1.75
6. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
7. Springfield Twp	13,955	13,395	95.99	395	2.83	170	1.22
	525,576	199,321	37.94	285,291	54.28	67,736	12.88

S3518, S3527, S3560, S3561, S3562, S710, S711, A3813, A3814, A3816, A604, A605

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
4. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
5. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
6. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	525,832	194,020	36.89	287,903	54.75	72,519	13.79

A3807

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
6. Union Twp	50,184	45,229	90.13	4,297	8.56	876	1.75
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	523,863	197,492	37.69	284,924	54.38	70,081	13.37

S3328, S3538, S770, A3646, A3732, A3767, A611

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Lyndhurst Twp	20,326	20,016	98.47	8	.04	482	2.37
2. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
3. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Clifton City	74,388	72,670	97.69	360	.48	1,542	2.07
6. Passaic City	52,463	32,210	61.40	10,364	19.75	17,933	34.18
	526,140	273,213	51.92	203,742	38.72	82,740	15.72

A3286

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Belleville Town	35,367	33,263	94.05	815	2.30	1,382	3.91
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. Nutley Town	28,998	27,758	95.72	483	1.67	499	1.72
6. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
7. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
	526,158	206,981	39.33	277,235	52.69	67,149	12.76

A3554

	Population 1980	White	White Pct	Black	Black Pct	Spanish	Spanish Pct
1. Belleville Town	35,367	33,263	94.05	815	2.30	1,382	3.91
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
4. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
5. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
6. West Orange Town	39,510	37,400	94.66	967	2.45	591	1.50
	528,815	209,107	39.54	277,584	52.49	67,107	12.69

S3548, S878, A3792, A615, A646

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
4. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
5. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
6. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
	526,001	201,166	38.24	281,168	53.45	69,891	13.28

S3525, A3776

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Irvington Town	61,493	34,268	55.73	23,397	38.05	5,181	8.43
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
5. Bayonne City	65,047	60,892	93.61	2,677	4.12	3,648	5.61
6. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	526,151	238,670	45.36	243,640	46.30	74,009	14.06

S3353

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Belleville Town	35,367	33,263	94.05	815	2.30	1,382	3.91
2. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
3. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
4. Glen Ridge Bor	7,855	7,516	95.68	135	1.72	134	1.71
5. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
6. Nutley Town	28,998	27,758	95.72	483	1.67	499	1.72
	526,950	226,098	42.90	259,060	49.16	66,111	12.64

A3573

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
5. West Orange Town	39,510	37,400	94.66	967	2.45	591	1.50
6. Harrison Town	12,242	11,566	94.48	28	.23	2,515	20.54
7. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
	527,130	201,720	38.26	283,178	53.72	69,599	13.20

S3547

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. Bloomfield Town	47,792	45,079	94.32	1,258	2.63	1,049	2.19
2. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
3. Maplewood Twp	22,950	21,636	94.27	1,003	4.37	385	1.68
4. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
5. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
6. South Orange Village	15,864	13,878	87.48	1,593	10.04	283	1.78
7. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
	526,603	206,980	39.30	278,072	52.80	67,048	12.73

S3526, S3531, S3563, A3780

	Population 1980	White	Pct White	Black	Pct Black	Spanish	Pct Spanish
1. East Orange City	77,690	11,065	14.24	64,626	83.18	1,793	2.31
2. Newark City	329,248	101,417	30.80	191,743	58.24	61,254	18.60
3. Orange City	31,136	12,084	38.81	17,840	57.30	1,804	5.79
4. East Newark Bor	1,923	1,821	94.70	9	.47	480	24.96
5. Union Twp	50,184	45,229	90.13	4,297	8.56	876	1.75
6. Hillside Twp	21,440	14,310	66.74	6,381	29.76	1,359	6.34
7. Springfield Twp	13,955	13,395	95.99	395	2.83	170	1.22
	525,576	199,321	37.94	285,291	54.28	67,736	12.58

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS, FEBRUARY 26, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

[2]

BEFORE:

JOHN J. GIBBONS,
Circuit Judge,
U.S. Court of Appeals,
For the Third Circuit.

CLARKSON S. FISHER,
Chief Judge,
U.S. District Court.

STANLEY S. BROTMAN
U.S. District Court Judge.

APPEARANCES:

GEORGE T. DAGGETT, Plaintiff
Attorney pro se.

HELLRING, LINDEMAN, GOLDSTEIN & SIEGAL, ESQS.,
BY: JONATHAN L. GOLDSTEIN, ESQ.,
STEPHEN L. DREYFUSS, ESQ., and
ROBERT S. RAYMAR, ESQ.,
For the Plaintiffs Civ. 82-388

GREENSTONE & SOKOL, ESQS.,
BY: LEON J. SOKOL, ESQ.,
For the Defendant Carmen Orechio, Pres, of N.J. Senate and the N.J. Senate

MARINARI & FARKAS, P.C.,
BY: LAWRENCE T. MARINARI, ESQ.,
For the Defendant Alan J. Karcher,
Speaker of N.J. Gen. Assembly.

BAUMGART & GENOVA, ESQS.,
BY: ANGELO J. GENOVA, ESQ.,
Of Counsel for the Defendant-Intervenors, James J. Florio, et al.

SILLS, BECK, CUMMIS, ZUCKERMAN,
RADIN & TISCHMAN, ESQS.,
BY: CHARLES WALSH, ESQ.,
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[3] IRWIN I. KIMMELMAN,
ATTORNEY GENERAL,
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For the Defendants in Civ. 82-388

JOSEPH F. SHANAHAN, ESQ.,
BY: RALPH FUCETOLA III, ESQ.,
For Proposed Intervenors,
Edward T. Magee, et al.

FRANK ASKIN, ESQ.,
Pro se Proposed Intervenor

* * * *

[34] * * * *

JUDGE GIBBONS: Are you saying that no bill could have achieved a lower deviation than the one that was enacted?

MR. WALSH: I am saying, based on Mr. Alito's submissions to the Court, that virtually every one of the Republican triggers, the bills which apparently should trigger this hearing, are defective in some quasi-constitutional or constitutional way.

JUDGE GIBBONS: But they were not enacted. Are you saying that?

MR. WALSH: Fortunately.

JUDGE GIBBONS: That on this record, no inference could be drawn that a redistricting plan achieving a lower deviation was possible.

MR. WALSH: I am saying, your Honor, that as I understand the bills, the only bill which one [35] could even arguably suggest would be a trigger before PL 1982 C1 was passed—

JUDGE GIBBONS: Mr. Walsh, you are being evasive. Answer the question. Are you saying that on the record that is before us, the depositions and exhibits, no inference could be drawn that a bill achieving a lower population deviation was possible?

MR. WALSH: I think an argument could be made, based on a couple of the bills which were introduced after PL 1982 C1 was passed into law, that an argument could be made that a lower absolute per cent deviation could be achieved.

JUDGE GIBBONS: Could an argument be made that had the Reock proposal been considered, a lower deviation could have achieved?

MR. WALSH: As I understand it the Reock proposal as it was introduced, as amended, I might add, by Assemblyman Hardwick, I understand that it permits a total absolute deviation of .4517 per cent. That is what I

understand. I also understand that the Reock proposal was altered in the submission in that Marie Muhler's town, Marlboro, was moved into the 3rd Congressional District.

Now, I don't know how much that changed Professor Reock's deviation but I must say—

[36] JUDGE GIBBONS: Could an inference be drawn from the fact that the Legislature had the Reock proposal back in the summer of '81 and didn't explore it, that they were not, in good faith, attempting to achieve mathematical equality?

MR. WALSH: In my judgment, I don't think any such inference could be drawn and I say that—

JUDGE GIBBONS: Why?

MR. WALSH: —because I think any interested citizen, Dr. Reock, perhaps another professor, perhaps an interested member of the Republican Party, perhaps an interested member of the Democratic Party, and perhaps a non-partisan, perhaps anybody in or out of the State of New Jersey could devise a plan. I assume an analog computer, if it were programmed to look for absolute mathematical certainty, could do the same thing.

Now, assuming—

JUDGE GIBBONS: If such a plan were called to the attention of the majority leadership in the Legislature, is it your position that refusing or neglecting to consider it does not at all bear on the legal requirements announced in the three Supreme Court cases?

MR. WALSH: I think in essence, that is our [37] position.

JUDGE GIBBONS: Does it bear on good faith effort to achieve mathematical equality?

MR. WALSH: I think on that standing alone, that would be correct.

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[40] • • •

JUDGE GIBBONS: That reminds me. You make reference to Mayor Gibson's affidavit. What I had was Mayor Gibson's statement and in another instance, somebody else's statement. What are they?

[41] MR. WALSH: Perhaps I am using the word, affidavit, loosely. Title 28, U.S. Code 1746 provides for a sworn statement in lieu of an affidavit. The reason for taking such—

JUDGE GIBBONS: Was that a sworn statement?

MR. WALSH: It was unsworn, but under 28 U.S.C. 1746, Judge Gibbons, if the statement in paragraph 15 is on the affidavit or the statement, and it is dated, it is admissible in Federal Court and would be an affidavit.

Now, of course, that is done for several reasons, aside from the fact that it is hard to find Notary Publics at two o'clock in the morning and it assists Federal Courts in taking affidavits or statements from various parts of the United States and I hope—

JUDGE GIBBONS: It is submitted then as an affidavit?

MR. WALSH: Under 28—1746, for the appropriate purposes permitted by statute.

JUDGE GIBBONS: All right.

MR. WALSH: And I believe there are other statements. Dr. Trussell is also a statement under that statute.

JUDGE GIBBONS: All right. You are submitting [42] them then as affidavits in support of your motion for summary judgment?

MR. WALSH: Precisely.

* * * *

JUDGE GIBBONS: And Mr. Walsh, on that part there are two questions:

First, is that a valid reason for departure from absolute—from an effort to achieve zero deviation which, for purposes of argument at the moment, we will accept and secondly, whether on this record, a fact finder could draw

any inference, other than that, that was the Legislative motivation?

MR. WALSH: I think, based on the record and given the full opportunity to cross-examine, it then may—

JUDGE GIBBONS: Your decision then is, there is no disputed issue of fact as to whether or not [43] that was the real motivation.

MR. WALSH: I think a fair reading of those affidavits, it makes it clear that that position is not being challenged. Maybe I am in error. I sat through the depositions seven hours and I don't think I heard that proposition challenged.

JUDGE GIBBONS: Well, I was reading the deposition. There was a fair amount of argument and colloquy but that argument is placed as advance argument.

In Mr. Goldstein's argument, he did say that at least some prior maps achieved the same thing in the 10th District as the map that was enacted.

MR. WALSH: Well, I most respectfully—

JUDGE GIBBONS: Wouldn't that support an inference that perhaps, the 10th District problem, was pretextual?

MR. WALSH: Let me see if I can answer your questions, Judge Gibbons.

The first question is, can we see, based on the present assertions and the other information before the Court, whether this is an appropriate matter for disposition by summary judgment.

Mr. Alito has, in connection with providing four affidavits which I might add in a bipartisan [44] effort, were all introduced, several of those affidavits clearly indicate all of the minority, black minority representation in the various districts and I think, by simple mathematical extrapolation, much of which has been done in connection with the arguments, but certainly, are not a matter of dispute as the facts presently exist, in other words, they could be developed, show that all of the other times being talked about today, dilute minority repre-

sentation in either the 10th Congressional District or in one instance, the Hartwick—

JUDGE GIBBONS: Well, that being so and those plans might be deficient for another reason but on the record before us, on the motion for summary judgment, how do the deviations which exist there on the question of preserving a black district in the 10th?

MR. WALSH: Well, I don't think that is what—perhaps we are on the same wave length, Judge Gibbons, so forgive me—

JUDGE GIBBONS: What you are advancing as a reason for not trying to achieve a zero deviation, the preservation of minority districts, how would the deviations which are reflected in a map being challenged, bear on it?

[45] MR. WALSH: Well, number one, we think within any measurement yardstick that we are dealing with here, we have absolute population equality.

JUDGE GIBBONS: Well, that is a different question.

MR. WALSH: But I didn't want to lose it. I am not suggesting it isn't a different question. I am going right to your question but I just didn't want you to feel, Judge Gibbons, that we have assumed that we are deviating from it. We think we are at zero, but if the Court thinks we are not at zero, and based on the case law makes that judgment as a panel, I say to the Court that there is uncontroverted evidence from various people testifying that they were making a good effort to achieve a result in the 10th Congressional District which did not preserve—

JUDGE GIBBONS: What is the population in the 10th Congressional District on the map, in the redistricting law as enacted?

MR. WALSH: Minus 227, under 526,059.

* * * *

[46] * * *

JUDGE GIBBONS: And the 4th, how does that bear on the underage in the 10th?

MR. WALSH: All right.

If one is putting together a map which reflects community interests and the 10th is one such jigsaw, and here is the 10th (indicating), the [47] 10th itself is surrounded by a salient from the 7th, and thereafter, is abutted by the 6th; as population and towns with communities of interest have moved in one district, as the Baer plan suggests and as the consensus developed around the law which was actually passed, other district lines move as well which may change their deviation. I can't say that that happened with certainty. There were many conversations and judgments which went into the passage of the present law.

JUDGE GIBBONS: Well, if you can't say with certainty, how can we predicate a motion, the granting of a motion for summary judgment for the defendants on this consideration of minority representation?

MR. WALSH: Because I think you asked me a different question, Judge Gibbons, in which I expressed uncertainty. You said, how can it be that an absolute deviation in the 6th Congressional District of point or minus .4298 is related to the 10th when I expressed to you what I think is a quite and appropriate and correct response, that in any map or any geographical construct, when you start to cut portions from that map, other portions may change and certainly, if enough of these jigsaw [48] pieces must be changed in the name of legitimate State interests, perhaps quasi-constitutional interests as I believe was suggested here, the other pieces of the jigsaw will change.

You then asked the question, Judge Gibbons, which I told you candidly, I don't know, and I don't know that this record can show how, or how was it precisely that it evolved into this map which made consideration of the 10th, a prejudgment that the 6th must exist as it were and I can't answer that.

JUDGE GIBBONS: Besides this preservation of a black district in the 10th, what other of those constitutionally significant considerations do you suggest?

MR. WALSH: It is not just the 10th, Judge Gibbons, it is also the problem—

JUDGE GIBBONS: Well, where are the minority's problem?

MR. WALSH: Well, the 4th, of course, is the one with a major deviation as well as Mr. Goldstein points it out—

JUDGE GIBBONS: Well now, besides the justification of preserving minority districts, minority-majority districts—

MR. WALSH: Yes, sir.

[49] JUDGE GIBBONS: —what other justification of constitutional significance to you rely on?

MR. WALSH: None.

* * * *

[54] * * *

JUDGE GIBBONS: The difference between plaintiffs and defendants at this point seems to be a fairly narrow one. You are relying on what seems to be a relatively undisputed fact, that the Democratic Leadership would not consider any bill with a deviation of over 1 per cent and on the fact that it did, to some extent at least, take into consideration the racial makeup of the 10th District. [55] Mr. Goldstein is saying that they also took into account partisan considerations and they rejected bills that may have produced a smaller deviation.

Aside from those areas, are there any areas in the case on which testimony might be appropriate?

MR. WALSH: In my judgment there are not, your Honor.

JUDGE GIBBONS: How about in your judgment, Mr. Goldstein, Mr. Daggett?

MR. GOLDSTEIN: I don't believe so, your Honor.

MR. DAGGETT: I don't suggest any, Judge.

JUDGE GIBBONS: If that is the case, assuming we are not prepared to rule off the bench at this time either

way on the cross motions for summary judgment, can we have put in evidence the depositions and exhibits, perhaps the affidavits, with the understanding that even if we deny the motion for summary judgment, that will be the record on which we decide the case?

MR. WALSH: Are you talking about Rule 65 now?

[56] JUDGE GIBBONS: You assume we have to resolve some disputed fact issue.

MR. WALSH: You are referring now to Rule 65 which allows the two hearings to collapse.

JUDGE GIBBONS: Yes.

MR. WALSH: I have no difficulty with that, your Honor.

JUDGE GIBBONS: You don't have any desire to present any of these witnesses live.

MR. WALSH: I think expedition is a very important thing. Those credibility issues are on the Court's mind, obviously, then the witnesses should appear and testify. If credibility is an issue, and I really submit that they are not terribly important here, at least as I see the record, then I don't see the need for witnesses and I certainly would like to see this matter resolved expeditiously and we agree that Rule 65 should control with respect to finality in this hearing.

JUDGE GIBBONS: What is the position of the plaintiffs in that respect?

MR. GOLDSTEIN: Your Honor, as long as all the submissions, all the depositions, all [57] of the affidavits are received in evidence, we would consent to that position.

JUDGE GIBBONS: Well, Mr. Daggett.

MR. DAGGETT: Yes, I agree, Judge.

JUDGE GIBBONS: We are now, of course, dealing, not only with the reliability and injunction stage, I am not suggesting that were we to decide in favor of an injunction, you couldn't make a further record with respect to relief and that's, the interests of the applicants for intervention on whose motions we have reserved, would

that procedure be adequately protected. I think at this point then, it would be appropriate for the Court to recess and for counsel, with the Court Reporter, to mark in evidence the depositions, exhibits and affidavits which should be considered as the record on the final hearing on the application for injunctive relief. We will remain here. It shouldn't take you too long. If you have any difficulty about what should be marked in evidence, we will be here to rule on it.

MR. WALSH: Very well, your Honor.

Thank you.

MR. GOLDSTEIN: Your Honor, if I may just [58] make one point: in discussing the 10th District, an analysis of Alito affidavits and also, Professor Reock's plan shows that in the attempt by the Legislature to, so-called, protecting itself from any dilution and Dr. Reock's plan, he included the City of Orange.

JUDGE FISHER: Yes. That's cut off now. We are familiar with that.

MR. GOLDSTEIN: You are familiar with it. Okay. Thank you.

JUDGE GIBBONS: Now, one other thing: do any of the parties desire any further briefing after today on this aspect of the case?

MR. WALSH: Your Honor, if the Court is going to take this under advisement and there are specific questions that the Court would like briefed, I am always a little uncomfortable in writing briefs and I understand that page 8 never made the final edition of my brief, just like Hunterton County did not make one of the plans—

JUDGE FISHER: Things move so fast, we understand that.

MR. WALSH: My concern is this: If the Court has any question that it feels should be [59] addressed by brief, certainly, I, representing one of the parties, would think I would want to respond.

JUDGE GIBBONS: Well, if we have any questions we will ask for a brief.

What about you, Mr. Goldstein?

MR. GOLDSTEIN: I agree. Just one point as a matter for the record: I think it might be helpful if we had the agreement of both, Mr. Sokol and Mr. Marinari and Mr. Cole, on behalf of the State of New Jersey, to this procedure, so we have it clear on the record and no one, at a later date, can complain that they disagreed with the procedure.

MR. COLE: Judge Gibbon's panel, on behalf of the Attorney General, the Secretary of State, Governor Keen, we consent to the Rule 65 procedure.

JUDGE GIBBONS: How about the representatives?

MR. MARINARI: Yes, your Honor, we do.

MR. SOKOL: Yes, your Honor.

JUDGE GIBBONS: All right.

* * * *

ORDER AMENDING OPINION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Title Omitted in Printing]

ORDER

The court having been made aware of an error in its opinion filed in this matter on March 3, 1982, it is on this day of March, 1982,

ORDERED that page 8, paragraph 2, of the majority opinion be amended to indicate the variance contained in the Sixth District as 2,261 people, or .4298%.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief Judge
United States District Court

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
Judge
United States District Court

[Filed Mar. 1, 1982]

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No. 81-2057

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN J. KARCHER, Speaker,
NEW JERSEY ASSEMBLY, *et al.*,

Appellants,

vs.

GEORGE T. DAGGETT, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of New Jersey

MOTION OF APPELLEES EDWIN B. FORSYTHE, *ET AL.* TO AFFIRM

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Questions Presented

1. Whether, in light of the District Court's unanimous finding that the New Jersey Legislature did not seek to preserve minority voting strength in enacting P.L. 1982, c.1, the legal issue of preservation of minority voting strength in congressional redistricting is not properly presented by this appeal and is therefore so unsubstantial as not to need further argument.

2. Whether appellants' failure to produce evidence in the District Court to establish the nature or extent of any actual "statistical imprecision" in the 1980 decennial census, in New Jersey or in the United States as a whole, renders their contention that such claimed imprecision can justify population deviations in congressional districts so unsubstantial as not to need further argument.

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On Appeal From the United States District Court for the District of New Jersey

MOTION OF APPELLEES EDWIN B. FORSYTHE, *ET AL.* TO AFFIRM

Appellees Edwin B. Forsythe, Matthew J. Rinaldo, Millicent Fenwick, Harold C. Hollenbeck, James A. Courter, Margaret S. Roukema, Christopher H. Smith, Thomas Dunn, Livio Mancino, Rev. Millard D. Birt, Rafael Fajardo, Margaret Dougherty, Maretta N. Jackson and C. Joseph Lillo respectfully move this Court, pursuant to Rule 16.1(c), to affirm the judgment of the three-judge

United States District Court for the District of New Jersey on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Constitutional Provision and Statutes Involved

Article I, Section 2 of the Constitution of the United States:

> Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty

Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

13 U.S.C. §§ 141(a) and 141(b) (Supp. 1981):

§ 141. Population and other census information, tabulation for legislative apportionment.

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

New Jersey P.L. 1982, c.1, the congressional districting statute at issue on this appeal, is set forth as Appendix A to the present motion. Appendix A also includes a map of the congressional districts created by P.L.1982, c.1.

Statement of the Case

After the publication of the results of the 1980 decennial census, the Clerk of the United States House of Representatives notified the Governor of New Jersey pursuant to 2 U.S.C. § 2a(b) that the number of representatives to which New Jersey is now entitled has been reduced from fifteen to fourteen. This change rendered the state's previous apportionment of congressional districts unconstitutional, and imposed upon the New Jersey Legislature the duty to reapportion the state into fourteen congressional districts in conformity with the mandate of Article I, § 2 of the Constitution, as interpreted by this Court in *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), and subsequent cases. Both houses of the Legislature passed a congressional redistricting bill on January 18, 1982. On the following day, his last in office, former Governor Brendan T. Byrne signed the bill into law as P.L. 1982, c.1.

Appellees instituted an action in the United States District Court for the District of New Jersey on February 9, 1982 (*Forsythe, et al.* v. *Kean, et al.,* Civil Action No. 82-388) to declare P.L. 1982, c.1 unconstitutional and to enjoin its enforcement, principally on the ground that the availability of other redistricting plans which created smaller population deviations than the .6984% overall deviation of P.L. 1982, c.1 rendered the deviation of the enacted plan "not unavoidable" and "not justified" within the meaning of *Kirkpatrick* v. *Preisler.* A three-judge

District Court convened pursuant to 28 U.S.C. § 2284(a) heard oral argument on February 19 and 26, 1982. Between those two dates, the parties took the depositions of a number of legislative leaders and submitted affidavits and exhibits to the court. The District Court consolidated the action with an earlier case (*Daggett* v. *Kimmelman, et al.*, Civil Action No. 82-297) and further consolidated the applications for preliminary and permanent injunctive relief pursuant to Fed.R.Civ.P. 65(a). With the consent of all parties, the depositions, affidavits and other exhibits were marked in evidence on February 26, 1982. No oral testimony was taken.

On March 3, 1982, with one judge dissenting, the District Court filed an opinion granting appellees' application for a declaratory judgment of unconstitutionality and for preliminary and permanent injunctions against the conducting of primary or general congressional elections pursuant to P.L. 1982, c.1. (Appendix A to Jurisdictional Statement, hereinafter "JSApp. A"; page references to Appendix will be cited "——a").

The court found from the deposition testimony that the Legislature was concerned with criteria other than population equality in considering competing redistricting plans, including the preservation of the influence in Congress of certain senior Democratic incumbents, a desire to keep counties and municipalities intact, and preservation of the cores of pre-existing districts. (6a) Though the legislative leaders also claimed to have sought to "protect minority interests" in drawing district lines, both the majority and dissenting opinions found as a fact that this claimed motivation was merely a pretext and bore no relation to the deviations created by P.L. 1982, c.1. (9a, 11a) The dissenting judge began his opinion by registering his agreement with the majority in this regard:

> I join fully in the court's findings of fact. . . . In particular, *I agree* that the only effort made by the Democratic legislative leadership to comply with *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) was Mr. Karcher's instruction that no plan would be considered which had a population deviation greater than one per cent, and *that the minorities' concentration justification for the deviations which were produced must on this record be rejected as pretextual.*

Dissenting opinion of Gibbons, J. (11a) (emphasis added)

The basis of the dissent was its author's view that *Kirkpatrick* v. *Preisler* permits toleration of purportedly *de minimis* population variances "which have no statistically relevant effect on relative representation," (13a) despite the Court's express mandate of precise mathematical equality "as nearly as is practicable." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964); *Kirkpatrick* v. *Preisler*, *supra*, 394 U.S. at 530-531. Neither the majority nor the dissent made any finding concerning any statistical imprecision in the 1980 census, but the dissent nonetheless would have held that the overall deviation created by P.L. 1982, c.1 "is smaller than the recognized margin of undercounting in the census." (14a) Neither opinion stated any view concerning what that 1980 "margin of undercounting" was in New Jersey or in the United States as a whole, or by whom it was so "recognized."

A judgment embodying the District Court's disposition was filed on March 8, 1982. (JSApp. B) On the same day, the three-judge District Court unanimously denied appellants' application for a stay pending appeal to this Court, as well as their alternative application for a stay pending a stay application in this Court. Appellants filed a notice of appeal in the District Court on March 8, 1982. (JSApp. C)

On March 15, 1982, Justice Brennan stayed the judgment of the District Court pending final determination of the appeal. (JSApp. D) On March 29, 1982, the Court denied motions to vacate the stay or to expedite the schedule for appeal in light of the scheduled June 8, 1982 congressional primary elections, (JSApp. E) and Justice Brennan denied a further motion to modify the stay on April 13, 1982. (JSApp. F)

ARGUMENT

1. The District Court properly concluded that it was unnecessary to decide whether the goal of concentration of minority voters can justify deviation from population equality in congressional districts, where it found as a fact that the Legislature had not been actuated by such a concern and that the population deviations in P.L. 1982, c.1 had not resulted from efforts to preserve minority political power.

Appellants contend that "[i]t is undisputed that the avoidance of the dilution of minority voting strength was an important consideration in the adoption of P.L. 1982, c.1, as opposed to alternatives proposed to the Legislature." (Jurisdictional Statement [hereinafter "JS- "], at 12) This assertion is simply false. Though Assembly Speaker Alan J. Karcher and Senator Matthew Feldman claimed in their depositions that the Legislature acted from such a concern, the District Court unanimously rejected that testimony as "pretextual" (11a) and without causal relationship to the population deviations created by the statute. (9a) The court further found that the statute's placement of the heavily-black City of Orange in the 93%-white Eleventh District instead of the predominantly black Tenth District was "difficult to reconcile" with appellants' claimed goal of preserving minority voting strength. (9a-10a)

The District Court's findings of fact must be upheld unless clearly erroneous. *City of Rome* v. *United States*, 446 U.S. 156, 183 (1980). In the present instance, the unanimous factual findings of both the majority and dissenting judges are unassailable.

Contrary to the impression created by Point 3 of the Jurisdictional Statement, (JS-11) the District Court did not rule as a matter of law that a legislature cannot justify population deviations in congressional districts by a concern for the avoidance of dilution of minority voting strength.[1] The District Court did not reach this legal issue because all three judges unanimously found as a matter of fact that the New Jersey Legislature was not actuated by such a concern in enacting P.L. 1982, c.1. When asked by the District Court at oral argument whether he had any evidence to demonstrate that the

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[1] Appellants assert that this Court held in *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 161-162 (1977) that the avoidance of dilution of minority voting strength is "a constitutionally permissible objective." (JS-14) It should be noted, however, that *United Jewish Organizations* was a state legislative redistricting case under the preclearance provisions of the Voting Rights Act of 1965, and did not involve congressional redistricting. The standard of "substantial" population equality among state legislative districts under the Fourteenth Amendment is significantly less demanding that the test of precise mathematical equality among congressional districts, "as nearly as practicable," pursuant to Article I, §2. *See, e.g., Chapman* v. *Meier*, 420 U.S. 1 (1976); *Gaffney* v. *Cummings*, 412 U.S. 735, 741-742 (1973); *Mahan* v. *Howell*, 410 U.S. 315, 322 (1973). This Court has not yet held that the precise population equality mandated for *congressional* districts may be sacrificed to avoid dilution of minority voting strength. That question is not properly presented by the instant appeal, however, because the District Court found as a fact that the deviations created by P.L. 1982, c.1 did not result from any legislative solicitude for minority rights. (9a-11a)

districts were drawn in order to avoid the dilution of minority strength, counsel for appellants was forced to concede that he could not "say that happened with certainty. There were many conversations and judgments which went into the passage of the present law." (Transcript of Proceedings, Feb. 26, 1982, at 47) Indeed, Assembly Speaker *Pro Tem* Christopher Jackman could not even recall whether P.L. 1982, c.1 had been defended in debate on the ground that it avoided dilution of minority power. Jackman Deposition at 47 (J.Ex. 2)

Moreover, appellants' claim that "P.L. 1982, c.1 protects minorities from having their votes diluted better than any of the alternatives presented to the legislature and relied upon by plaintiffs in this action" is false. (JS-12) The affidavit of Samuel A. Alito, Executive Director of the Office of Legislative Services of the New Jersey Legislature, compiled for the District Court the minority racial characteristics of the congressional districts created by each redistricting plan available to the Legislature. (J.Ex. 4) The Alito Affidavit demonstrates that the Tenth District created by P.L. 1982, c.1 (identified in the affidavit by its bill number as S-711) is 54.75% black. By contrast the Tenth District which would have been created by A-3817, which had an overall population deviation of only .451% as opposed to the enacted law's .6984%, would have been 56.70% black.

The evidence before the District Court demonstrated that there were at least four redistricting bills available to the New Jersey Legislature which resulted in smaller overall population deviations than P.L. 1982, c.1 and also protected minority voting power in the Tenth District. The District Court relied upon the following four plans[2]

[2] The list of plans at JS-12, n.12 is inaccurate.

in support of its conclusion "that the .6984% population deviation of P.L. 1982, c.1 is not unavoidable" (8a):

Bill No.	*Sponsor*	*Date Proposed*[3]	*Deviation*	*% Black-10th Dist.*
P.L. 1982, c.1 (S-711)	Feldman	1/12/82	.6984%	54.75
A-3547	DiFrancesco	1/ 4/82	.1252%	52.80
A-3817	Hardwick	1/11/82	.4515%	56.70
A-614	Bennett	1/18/82	.1369%	53.21
A-615	Kavanaugh	1/18/82	.0293%	53.45

As the District Court observed, the City of Orange is 57.30% black. A-3817 places Orange in the 56.70%-black Tenth District, while P.L. 1982, c.1 places Orange in the 93%-white Eleventh District.

In summary, therefore, the District Court correctly found as a matter of fact that appellants' "minority dilution" excuse for the Legislature's outright failure to adopt the available redistricting plan which achieved as nearly as practicable the precise population equality required by *Kirkpatrick* v. *Preisler, supra,* 394 U.S. 526 (1969) and *White* v. *Weiser,* 412 U.S. 783 (1973), was "pretextual" and unrelated to the Legislature's adoption of the present law. Since this finding of fact is firmly supported by the evidence below, and is certainly not clearly erroneous, it cannot be disturbed and must govern this appeal. Based on this factual finding, in which both the majority and

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[3] Contrary to the assertion in the Jurisdictional Statement that A-614 and A-615 were "submitted to the legislature after P.L. 1982, c.1 became law," (JS-12) these bills were introduced on January 18, 1982 and P.L. 1982, c.1 was not enacted until January 19, 1982. A-3817, which has a greater black percentage in the Tenth District than P.L. 1982, c.1, was introduced *before* the bill which was ultimately enacted as P.L. 1982, c.1.

dissenting judges joined, the District Court properly held that it was unnecessary for it to decide the legal issue appellants now urge this Court to decide in the first instance: whether efforts to avoid dilution of minority voting power would justify avoidable population deviations in congressional districts. Since the District Court did not decide this legal question because it was obviated by the court's findings of fact, the issue is not properly presented for decision in this Court.

2. The District Court properly declined to consider any purported statistical imprecision in the 1980 census in assessing the validity of P.L. 1982, c.1, since the record before it was devoid of any reliable basis for determining the nature or extent of any such imprecision.

Appellants assert that the District Court erred in invalidating P.L. 1982, c.1 because the population deviations created by the statute, which the court found to be greater than those of other redistricting plans which were available to the Legislature, "were within the statistical imprecision of the census." (JS-7) Once again, the factual record before the District Court does not support appellants' claim and renders the "census imprecision" issue so unsubstantial as not to warrant oral argument.

The sole purported support in the record for appellants' claim that the overall population deviation of P.L. 1982, c.1 is less than the statistical imprecision of the census was the "Statement of James Trussell." (Ex. "DFLH-5" below) Contrary to the implication of the Jurisdictional Statement, (JS-8) Dr. Trussell did not "testify" but merely submitted an unsworn "statement" which he "certified" to be correct. Dr. Trussell's conclusions are mixed and

contradictory, and provide absolutely no reliable basis for any assessment of the statistical accuracy or imprecision of the 1980 census.

For example, Dr. Trussell initially states that the 1980 census overcounted the actual population of the United States:

> The situation, however, is quite different in 1980. The preliminary demographic estimate indicates an actual *overcount* in the United States population of four-tenths of one percent (.4%). Already many demographers have suggested that this estimate is so low because the Census Bureau uses too low a net immigration figure. If the net immigration figure is raised to account for a *presumed stock of illegal aliens counted in the census,* then the estimate of the undercount would be consequently raised.

Statement of Trussell, at ¶ 7, p. 5 (emphasis in original). Then Dr. Trussell candidly admits that he cannot even estimate the extent of any census imprecision in New Jersey:

> The undercount for New Jersey in the 1980 census is unknown, and no reliable methodology exists for estimating it.

Statement of Trussell, at ¶ 14, p. 8. Although he points out that "all the evidence to date indicates that all places are not undercounted to the same extent, since the undercount rate has been shown to depend on race, sex, age, income and education," ¶ 13 at p. 8, Dr. Trussell nevertheless opines that "I see no reason to believe" that the New Jersey undercount "is below the national average." ¶ 14, at pp. 8-9.

The problems with Dr. Trussell's "analysis" are endless. He "see[s] no reason to believe" that New Jersey's census undercount is below the national average undercount, whatever that may be, but also "see[s] no reason to believe" that New Jersey's undercount "would be uniformly spread over all municipalities." ¶ 14, at p. 9. Why Dr. Trussell nevertheless sees a reason to believe that the national undercount would be uniformly spread over all states, so that New Jersey's undercount would not be below the national average, is not explained.

Moreover, nowhere in his statement does Dr. Trussell state with any assurance what the "national average" undercount is. All he can provide is a "preliminary estimate," and his preliminary estimate of the "national average" reflects an *overcount* of .4%. ¶ 7, at p. 5. He would adjust this figure "to account for a *presumed stock of illegal aliens counted in the census*," *id.* (emphasis in original), and without further elucidation arrives at a "conclusion" that "the undercount in the 1980 Census is likely to be above one percent, once an estimate of the number of illegal aliens is explicitly included in the demographic equation." ¶ 13, at p. 3. The critical role played in his calculations by illegal aliens, who cannot vote and are not entitled to representation in congressional elections, highlights the danger of reliance upon this kind of shifting, speculative extrapolation in determining the constitutional validity of a congressional redistricting statute.

In addition, appellants disregard the fact that reliance on the census for the determination of congressional representation is mandated by the Constitution. Article I, § 2, cl. 3 provides in pertinent part as follows:

> Representatives shall be apportioned among the several States which may be included within this

> Union, according to their respective numbers. The actual enumeration shall be made . . . within every subsequent term of ten years, in such manner as [Congress] shall by law direct.

Pursuant to this clause, Congress directed the Secretary of Commerce to take a decennial census in 1980 and every ten years thereafter. 13 U.S.C. § 141(a) (Supp. 1981). Congress has further directed that this "tabulation of total population by States" be used for the apportionment of Representatives in Congress among the several States. 13 U.S.C. § 141(b) (Supp. 1981) It was precisely such an apportionment which resulted in the reduction of New Jersey's congressional representation from fifteen to fourteen, and which necessitated the enactment of a new congressional redistricting statute by the New Jersey Legislature.

In summary, the constitutional mandate is "precise mathematical equality . . . as nearly as practicable," *Kirkpatrick* v. *Preisler, supra,* 394 U.S. at 530-531, and the constitutional and statutory basis for assessing state compliance with that standard is the decennial census. Regardless of the existence or nature of any statistical imprecision in the 1980 census, on which even experts cannot agree and of which no reliable showing was made below, the census is "the best population data available to the legislature" and the sole legal standard for the measurement of the population of New Jersey's congressional districts. *Kirkpatrick* v. *Preisler, supra,* 394 U.S. at 528. The Trussell Statement crystallizes the wisdom of the District Court's decision not to rely upon unproved, speculative estimates of purported variances in the census as a basis for constitutional analysis.

Nor does the dissent below provide support for appellants' contention. Though he recites Census Bureau

estimates of the 1970 census' "margin of error," Judge Gibbons makes no finding concerning what the statistical imprecision of the *1980* census might be—nor could he have on this record. The dissent takes the position that *Kirkpatrick* bars avoidable population deviations in congressional districts only to the extent that such deviations "achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts." (13a) Then, without reference to any facts in the record which are claimed to establish a "statistically relevant" level for the 1980 census, the dissent simply states that the deviation of P.L. 1982, c.1 "falls within the . . . category" of "*de minimus* [sic] population variances which have no statistically relevant effect on relative representation." *Id.*

The limitations of the record below, which constrained the District Court not to decide the "census error" argument presented here, similarly render this issue so unsubstantial as not to warrant oral argument in this Court. For these reasons, the motion to affirm should be granted.

3. The District Court properly ruled that the population deviations in the congressional districts created by P.L. 1982, c.1 were not unavoidable, and that the statute did not achieve as nearly as practicable the precise population equality mandated by Article I, § 2 of the Constitution.

Appellants contend that "the District Court's decision would require that most reapportionment plans based on the 1980 census be held unconstitutional." (JS-5) This claim misses the constitutional point of *Kirkpatrick* v. *Preisler, supra,* 394 U.S. 526, and *White* v. *Weiser, supra,* 412 U.S. 783, which made clear that compliance with Article I, § 2 depends on the particular facts of each case in each state. Justice Brennan straightforwardly summarized the constitutional mandate in *Kirkpatrick*:

> Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, *the command of Art. I, § 2,* that States create congressional districts which provide equal representation for equal numbers of people *permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.*

394 U.S. at 531 (emphasis added). There can be no question from the record before this Court, as elucidated in both the majority and dissenting opinions below, that the population variances created by P.L. 1982, c.1 were neither unavoidable nor justified.

Moreover, appellants' contention that other cases in other districts have sustained more deviant plans is simply immaterial:

> The whole thrust of the "as nearly as practicable" approach is inconsistent with the adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district.

394 U.S. at 530. The only question before the District Court in the present case was whether New Jersey could have done better than it did in achieving, "as nearly as practicable," the "precise mathematical equality" required by the Constitution. That is also the only issue properly raised on appeal, and the District Court's well-supported and unanimous findings of fact require that its judgment be affirmed.

There can be no question on this record that New Jersey had available to it redistricting plans which would have achieved far more precise mathematical equality than does P.L. 1982, c.1[4], and that the Legislature simply refused

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[4] A-3547, proposed January 4, 1982, .1252%; A-3817, proposed January 11, 1982, .4515%; A-614, proposed January 18, 1982, .1369%; A-615, proposed January 18, 1982, .0293%. An alternative plan by Prof. Ernest C. Reock, Jr. of Rutgers University was sent to all legislators as early as August 1981, but was rejected by the legislative leadership as insufficiently partisan. *See* Letter from Assembly Speaker Christopher J. Jackman to Ernest C. Reock, Jr., dated August 28, 1981, attached to the opinion of the District Court as Appendix B. (JSApp. A, 23a-29a) As the District Court observed, the Reock plan would have created a total deviation of only .3250%. As it was later amended to take into account changes in the census enumeration for East Orange, the Reock plan's total deviation dropped to only .2960%. (8a) A-614 would have created a deviation of only .0294% more than 23 times smaller than that created by P.L. 1982, c.1. (8a; *see* Affidavit of Samuel A. Alito, J.Ex. 4)

to give them good-faith consideration.[5] Since the District Court also unanimously rejected appellants' factual assertions of "justification" for the Legislature's failure to enact a more precisely equal plan, appellants' claims are so unsubstantial as not to need oral argument. *See* Point 1, *supra*, at 7-11.

This Court has recently summarily affirmed a number of District Court judgments which had been challenged on the similar ground that they gave insufficient deference to state policies. *See, e.g., Orwoll* v. *LaComb* (D. Minn.

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[5] The District Court, in weighing appellants' claims of good faith, evaluated the Legislature's response to the available alternative redistricting plans which achieved greater population equality than P.L. 1982, c.1. In particular, the court traced the legislative leadership's perfunctory reception and swift rejection of the plan submitted by Professor Reock, which would have decreased the population deviation.

The reply to Professor Reock by Speaker Jackman, which the District Court majority termed "remarkable" (5a) and the dissenting judge assessed as "harshly partisan" and "disedifying, to say the least," (13a) is only one example of the Legislature's indifference to the constitutional mandate. Another alternative plan was introduced in the prior session of the Senate as S-3549, and reintroduced in the new Legislature and cited by the District Court as A-614. (8a) A-614 had a total percentage deviation of only .1369%, as compared to the .6984% deviation in P.L. 1982, c.1. Although the deviation in A-614 was less than one-fifth of that in the bill that was enacted, the enacted bill's sponsor, Senator Matthew Feldman, admitted in his deposition that he and the rest of his Senate majority had treated the predecessor of A-614 as a "charade." The bill was considered late at night, Mr. Feldman recounted, and at night "[i]t has been a proven history of the New Jersey State Legislature that you relax and the tension isn't there and so there is some degree of 'horseplay.'" In short, according to Senator Feldman, though he knew it had a low population deviation A-614 received only "tongue-in-cheek treatment" and was not passed. Deposition of Matthew Feldman, at 67-68 (J.Ex. 1).

1982), *aff'd mem.* (No. 81-1770, May 17, 1982); *Schatzle* v. *Kirkpatrick* (No. 81-1731, May 17, 1982), *aff'g mem. Shayer* v. *Kirkpatrick* (W.D. Mo. 1982). In the latter case, the Court rejected as unsubstantial the appellants' assertion that *Kirkpatrick* v. *Preisler, supra,* 394 U.S. 526 (1969), should be overruled. Appellees respectfully submit that the District Court's legal analysis and restrained judgment in the present case are a faithful and unexceptionable application of *Kirkpatrick* and its progeny, and that the motion to affirm should therefore be granted. In light of the scheduled June 8, 1982 congressional primary election and the stay previously entered by Justice Brennan pending the Court's action on the Jurisdictional Statement, appellees further respectfully request that the Court announce its decision on the motion before that date.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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APPENDIX A

Senate, No. 711

STATE OF NEW JERSEY

INTRODUCED JANUARY 12, 1982

By Senator FELDMAN

(Without Reference)

AN ACT creating districts for the election of members to the House of Representatives of the United States of America to serve in the 98th Congress and each subsequent Congress, and repealing sections 1 and 2 of P. L. 1966, c. 156 and P. L. 1981, c. 561.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Congressional District Act for the State of New Jersey (1982)."

2. For the purpose of electing members of the House of Representatives of the United States of America from the State of New Jersey to serve in the 98th Congress and each subsequent Congress, the State of New Jersey shall be divided into the following 14 single-member districts:

First. The county of Gloucester and that portion of the county of Camden embracing Audubon, Audubon Park, Barrington, Bellmawr, Berlin, Berlin township, Brooklawn,

Camden, Chesilhurst, Clementon, Gibbsboro, Gloucester township, Haddonfield, Haddon Heights, Hi-Nella, Laurel Springs, Lindenwold, Magnolia, Mount Ephraim, Pine Hill, Pine Valley, Runnemede, Somerdale, Stratford, Tavistock, Voorhees, Waterford, Winslow, and Woodlynne.

Second. The counties of Salem, Cumberland, Cape May, and Atlantic that portion of the county of Ocean embracing Barnegat, Barnegat Light, Beach Haven, Eagleswood, Harvey Cedars, Little Egg Harbor, Long Beach, Ocean, Ship Bottom, Stafford, Surf City, Tuckerton, and that portion of the county of Burlington embracing Bass River, Tabernacle and Washington.

Third. That portion of the county of Monmouth embracing Aberdeen, Allenhurst, Asbury Park, Atlantic Highlands, Avon, Belmar, Bradley Beach, Deal, Eatontown, Englishtown, Fair Haven, Hazlet, Highlands, Interlaken, Keansburg, Keyport, Loch Arbour, Long Branch, Manalapan, Manasquan, Matawan, Middletown, Monmouth Beach, Neptune city, Neptune township, Oceanport, Ocean, Red Bank, Sea Bright, Sea Girt, South Belmar, Spring Lake, Spring Lake Heights, Union Beach, West Long Branch, that portion of the county of Ocean embracing Bay Head, Brick, Lakewood, Mantoloking, Point Pleasant Beach, Point Pleasant, and that portion of the county of Middlesex embracing Old Bridge.

Fourth. That portion of the county of Burlington embracing Beverly, Bordentown city, Bordentown township, Burlington city, Burlington township, Chesterfield, Cinnaminson, Delanco, Delran, Edgewater Park, Florence, Mansfield, Maple Shade, Palmyra, Pemberton borough, Pemberton township, Riverside, Riverton borough, Springfield,

Willingboro, Wrightstown and Fieldsboro, that portion of the county of Camden embracing Merchantville and Pennsauken, that portion of the county of Mercer embracing East Windsor, Ewing, Hamilton, Hightstown, Lawrence, Trenton, Washington and West Windsor, that portion of the county of Middlesex embracing Plainsboro and that portion of the county of Monmouth embracing Allentown, Roosevelt and Upper Freehold.

Fifth. That portion of the county of Bergen embracing Allendale, Closter, Cresskill, Demarest, Harrington Park, Haworth, Ho-ho-kus, Mahwah, Midland Park, Montvale, Northvale, Northvale, Old Tappan, Oradell, Park Ridge, Ramsey, Ridgewood, River Edge, River Vale, Rockleigh, Saddle River, Upper Saddle River, Waldwick and Wyckoff, that portion of the county of Hunterdon embracing Alexandria, Bethlehem, Bloomsbury, Delaware, East Amwell, Flemington, Franklin, Frenchtown, Hampton, Holland, Kingwood, Lambertville, Milford, Raritan, Stockton, Union, West Amwell and that portion of the county of Mercer embracing Hopewell, Hopewell township and Pennington, that portion of the county of Morris embracing Boonton, Boonton township, Denville, Jefferson, Mine Hill, Montville, Mount Arlington, Mount Olive, Randolph and Roxbury, that portion of the county of Passaic embracing Ringwood and West Milford, that portion of the county of Sussex embracing Branchville, Frankford, Hampton, Lafayette, Montaque, Sandyston, Stillwater, Sussex, Vernon, Walpack and Wantage and that portion of the county of Warren embracing Alpha, Belvidere, Blairstown, Franklin, Greenwich, Hackettstown, Hardwick, Harmony, Hope, Knowlton, Liberty, Lopatcong, Oxford, Pahaquarry, Phillipsburg, Pohatcong, Washington, Washington township and White.

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Sixth. That portion of the county of Middlesex embracing Carteret, East Bruswick, Edison, Helmetta, Highland Park, Metuchen, Milltown, New Brunswick, Perth Amboy, Piscataway, Sayreville, South Amboy, South Plainfield, South River, Spotswood and Woodbridge and that portion of the county of Union embracing Linden, Rahway and Winfield.

Seventh. That portion of the county of Mercer embracing Princeton, Princeton township, that portion of the county of Middlesex embracing Cranbury, Dunellen, Jamesburg, Middlesex, Monroe, North Brunswick and South Brunswick, that portion of the county of Monmouth embracing Freehold, Freehold township, Marlboro and Millstone, that portion of the county of Somerset embracing Bound Brook, Franklin, Manville, Millstone, North Plainfield, Rocky Hill and South Bound Brook and that portion of the county of Union embracing Clark, Cranford, Elizabeth, Fanwood, Garwood, Plainfield, Roselle, Roselle Park, Scotch Plains and Westfield.

Eighth. That portion of the county of Bergen embracing Franklin Lakes, Garfield, Oakland and Wallington, that portion of the county of Morris embracing Butler, Dover, Kinnelon, Lincoln Park, Peqannock, Riverdale, Rockaway, Rockaway township, Victory Gardens and Wharton and that portion of the county of Passaic embracing Bloomingdale, Clifton, Haledon, Hawthorne, North Haledon, Passaic, Paterson, Pompton Lakes, Prospect Park, Wanaque and Wayne.

Ninth. That portion of the county of Bergen embracing Alpine, Bergenfield, Bogota, Carlstadt, Cliffside Park, Dumont, East Rutherford, Edgewater, Elmwood Park,

Appendix A

Emerson, Englewood, Englewood Cliffs, Fair Lawn, Fairview, Fort Lee, Glen Rock, Hackensack, Hasbrouck Heights, Hillsdale, Leonia, Lodi, Maywood, Moonachie, New Milford, Norwood, Paramus, Ridgefield Park, Rochelle Park, Rutherford, Saddle Brook, South Hackensack, Teaneck, Tenafly, Teterboro, Washington, Westwood, Woodcliff Lake and WoodRidge.

Tenth. That portion of the county of Essex embracing East Orange, Glen Ridge, Irvington, Newark and South Orange, that portion of the county of Union embracing Hillside, and that portion of the county of Hudson embracing Harrison.

Eleventh. That portion of the county of Bergen embracing North Arlington, that portion of the county of Essex embracing Belleville, Bloomfield, Caldwell, Cedar Grove, Essex Fells, Fairfield, Livingston, Lyndhurst, Maplewood, Montclair, North Caldwell, Nutley, Orange, Roseland, Verona, West Caldwell and West Orange, that portion of the county of Hudson, embracing East Newark, Kearny and Secaucus, that portion of the county of Morris embracing East Hanover, Mountain Lakes and Parsippany-Troy Hills, and that portion of the county of Passaic embracing Little Falls, Totowa and West Paterson.

Twelfth. That portion of the county of Essex embracing Millburn, that portion of the county of Hunterdon embracing Califon, Clinton, Clinton township, Glen Gardner, High Bridge, Lebanon, Lebanon township, Readington and Tewksbury, that portion of the county of Morris embracing Chatham, Chatham township, Chester, Chester township, Florham Park, Hanover, Harding, Madison, Mendham, Mendham township, Morris Plains, Morris town-

ship, Morristown, Netcong, Passaic and Washington, that portion of the county of Somerset embracing Bedminster, Bernards, Bernardsville, Branchburg, Bridgewater, Far Hills, Green Brook, Hillsborough, Montgomery, Peapack-Gladston, Raritan, Somerville, Warren and Watchung, that portion of the county of Sussex embracing Andover, Andover township, Byram, Franklin, Fredon, Green, Hamburg, Hardyston, Hopatcong, Newton, Ogdensburg, Sparta and Stanhope, that portion of the county of Union embracing Berkeley Heights, Kenilworth, Mountainside, New Providence, Springfield, Summit and Union township and that portion of the county of Warren embracing Allamuchy, Frelinghuysen, Independence and Mansfield.

Thirteenth. That portion of the county of Burlington embracing Easthampton, Evesham, Hainsport, Lumberton, Medford Lakes, Medford, Moorestown, Mount Holly, Mount Laurel, New Hanover, North Hanover, Shamong, Southampton, Westhampton and Woodland, that portion of the county of Ocean embracing Beachwood, Berkeley, Dover, Island Heights, Jackson, Lacey, Lakehurst, Lavallette, Ocean Gate, Pine Beach, Plumsted, Seaside Heights, Seaside Park, South Toms River and Manchester, that portion of the county of Monmouth embracing Brielle, Colts Neck, Farmingdale, Holmdel, Howell, Little Silver, Rumson, Shrewsbury, Shrewsbury township, Tinton Falls and Wall that portion of the county of Camden embracing Cherry Hill, Collingswood, Haddon, Lawnside and Oaklyn.

Fourteenth. That portion of the county of Bergen embracing Little Ferry, Palisades Park and Ridgefield and that portion of the county of Hudson embracing Bayonne,

Appendix A

Guttenberg, Hoboken, Jersey City, North Bergen, Union city, Weehawken and West New York.

3. Sections 1 and 2 of P. L. 1966, c. 156 (C. 19:46-2 and 19:46-3) and P. L. 1981, c. 561 are repealed.

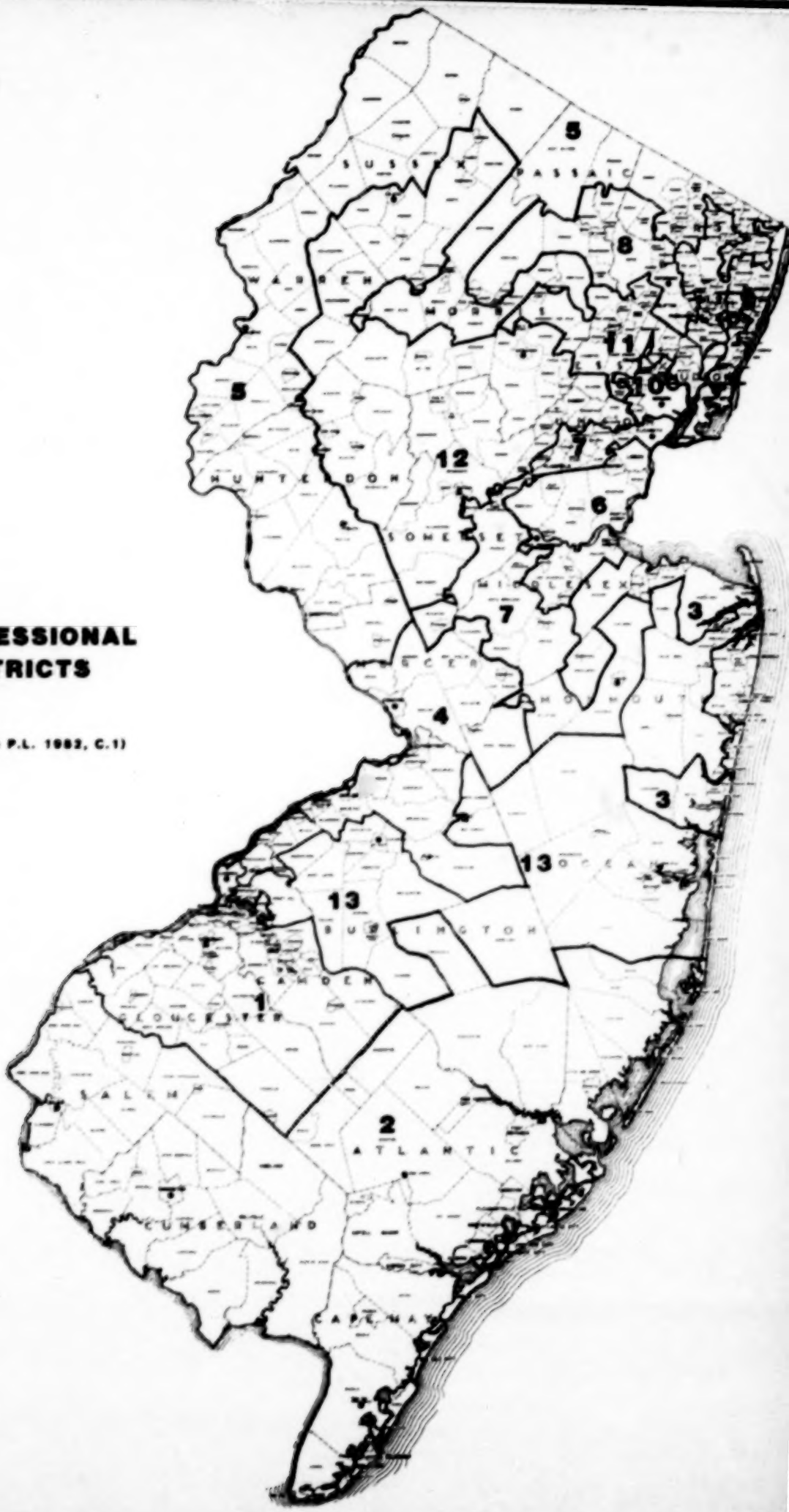
4. This act shall take effect immediately

STATEMENT

The purpose of this bill is to create 14 Congressional Districts for use beginning with the 98th Congress.

CONGRESSIONAL DISTRICTS

(Pursuant To P.L. 1982, C.1)



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No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of New Jersey

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APPELLANTS' REPLY MEMORANDUM

This is simply not a case for summary affirmance. The record squarely presents the two, substantial, and as yet unresolved questions raised in Appellants' Jurisdictional Statement.

On January 19, 1982, the New Jersey Legislature enacted a reapportionment plan for the election of United States Representatives. Based on data from the 1980 Census, the plan's fourteen districts have an average population deviation of 0.135%, and a maximum deviation (between the smallest and largest districts) of 0.6984%. The District Court concluded that the Legislature could have enacted a plan which, using the 1980 Census figures, would appear to have had a smaller population deviation. The District Court therefore held the Legislature's plan

unconstitutional. However, Census data are not and cannot be made entirely accurate. As shown by the uncontradicted evidence on this record, the plan enacted by the Legislature has a maximum deviation that is *smaller* than the statistical imprecision of the Census figures used to calculate that deviation. As Dr. Trussell put the matter, "In my professional opinion, districts whose enumerated populations differ from one another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion." [1] The record thus squarely pre-

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[1] Exhibit DFLH-5 below, at 9. This exhibit is the statement of Dr. James Trussell of Princeton University, a member of the National Academy of Sciences panel convened to study plans for the 1980 Census. Dr. Trussell was responsible for evaluating the Census Bureau's methodology designed to estimate population undercount. DFLH-5, p. 2. Dr. Trussell's statement, unsworn, was made under the penalty of perjury as authorized by 28 U.S.C. § 1746, and under that statute has precisely the same force and effect as if the statement were made in the form of an affidavit. Understandably, Appellees made no objection to this quite proper procedure below. In fact, at the hearing below Appellees' counsel agreed to submit the case for decision without the presentation of live witnesses "as long as all the submissions, all the depositions, all of the affidavits are received in evidence." Transcript of Proceedings, February 26, 1982, at 56-57. That some of the evidence—including, specifically, Dr. Trussell's—had been submitted in the manner authorized by 28 U.S.C. § 1746 had been discussed previously and accepted by the District Court at the hearing. *Id.* at 40-42. To the extent that statements in their Motion to Affirm, at 11, may be objections to the form in which this evidence was presented, the objections are both untimely and unwarranted.

Appellees also claim that Dr. Trussell's statements are "mixed and contradictory," *id.* at 11-12, and therefore should be disregarded. They miss the point. Dr. Trussell's testimony was that "The undercount for New Jersey in the 1980 Census is unknown, and no reliable methodology exists for estimating it." Exhibit DFLH-5 below, p. 8. Appellees merely point to supporting testimony making some of the uncertainties explicit. Of course, if it were possible to know the inaccuracy of the Census precisely, appropriate correction could be made and it would no longer be inaccurate.

sents the question whether state legislatures must pursue the illusory goal of creating congressional districts with population deviations smaller than the statistical imprecision inherent in the figures used to calculate these population deviations.

Likewise, the record squarely presents the question whether the minuscule deviation from absolute census population equality embodied in the Legislature's plan is in any event justified by the Legislature's desire to avoid undue dilution of minority voting strength. Appellees seek to characterize this as a merely factual question resolved by the District Court. It is not. Nowhere in its opinion did the District Court reject the uncontradicted testimony of legislative leaders that one major goal of any reapportionment plan enacted must be to preserve minority voting strength. Nor did that court find that any of the other plans presented to the Legislature would have protected minority voting strength as well as the plan enacted.[2]

Instead, the District Court imposed an additional requirement. It held that every deviation from absolute census population equality must be shown to be directly,

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The whole point of Dr. Trussell's testimony is that we do not, and with presently available methods can not, know the exact size of the New Jersey undercount.

[2] In fact, the alternatives would not have protected minority voting strength as well as the Legislature's plan. For all but one of the alternatives this is so, even if, like Appellees, one considers only the Tenth District. See Jurisdictional Statement, at 12-13; Application for Stay, at 19-21. Although the Hardwick Plan (A-3817) left a few more black voters in the Tenth District than the Legislature did (56.70% compared to 54.75%), it seriously diluted black voting power elsewhere in the State. Under the Legislature's plan, the Fourth District (Trenton and surroundings) is more than 16% black. Under the Hardwick Plan it would have been less than 12% black, and several of the fastest-growing black townships would have been excluded from the district. DFLH Exhibit 4 below, at 6. Not surprisingly, the Legislature's plan was preferred by black leaders over any of the alternatives. See Application for Stay, at 21.

causally related to the preservation of minority voting strength. The District Court concluded that preservation of minority voting strength was the *only* legislative goal presented by this record that could justify any deviation from absolute census population equality. This Court, however, has never suggested that no other goals could ever justify such a deviation. *E.g.*, *White v. Weiser*, 412 U.S. 783, 790-791 (1973). And of course, to say that the Legislature may have had other goals in mind in addition to the goal of preventing dilution of minority voting power does not mean that preventing dilution of minority voting power is not a proper goal, and one highly relevant when considering the constitutionality of the Legislature's redistricting plan. See *Katzenbach v. Morgan*, 384 U.S. 641, 656-658 (1966).

Even accepting this questionable conclusion of law, the District Court's judgment on the question of preservation of minority voting strength contains a more fundamental flaw. That court's consideration of the question focused solely on the fact that the Legislature's plan failed to include Orange, "a city with a high concentration of minority groups," in the Tenth Congressional District. The Tenth District is 54.8% black under the plan adopted by the Legislature. Of course Orange, which as the District Court observed is 57.3% black, could have been placed in the Tenth District. What the court failed to note, however, is that to include Orange in the Tenth District would have required that an equal number of voters—many of them black—would have had to be removed from the Tenth District and placed somewhere else. This shift, in turn, might require voters from the new district to be moved into yet a third district, and so forth. The fundamental flaw in the District Court's analysis is that it focused on the Tenth District alone, not recognizing that under the general goal of districts with equal population it is impossible to shift voters out of one district without simultaneously moving other voters out of another district.

Finally, this Court's recent summary affirmances in *Orwoll v. LaComb* (No. 81-1770, May 17, 1982) and *Schatzle v. Kirkpatrick* (No. 81-1731, May 17, 1982) have, as the Court is well aware, nothing to do with the present case. In neither of those cases had the state legislature adopted any reapportionment plan at all, and the questions presented therefore had to do with the proper role of a District Court required to apportion a State's congressional districts in the absence of any authoritative indication of state policy from the Legislature. Here, by contrast, the New Jersey Legislature has enacted a plan of congressional reapportionment with population deviations less than the statistical imprecision in the 1980 census figures. Unless the Legislature's role in congressional reapportionment is to be reduced to that of a computing machine, with no room whatsoever for considerations of state policy, that plan should be upheld.

Appellants' Motion to Affirm should therefore be denied.

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No. 81-2057

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Appellees.

On Appeal from the United States District Court for the District of New Jersey

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QUESTIONS PRESENTED

1. Whether the legislatively enacted congressional reapportionment plan with districts which deviate from population equality by less than the statistical imprecision of the census is constitutional.

2. Whether the legislative policy of preserving minority voting strength justifies small deviations from census population equality in a congressional reapportionment plan.

PARTIES BELOW

Appellant Alan J. Karcher is the Speaker of the New Jersey Assembly. Appellant Carmen A. Orechio is the President of the New Jersey Senate. Appellants James J. Florio, William J. Hughes, James J. Howard, Robert A. Roe, Peter W. Rodino, Jr., Joseph G. Minish, Frank J. Guarini, and Bernard J. Dwyer are Democratic Members of Congress from New Jersey. Appellants were permitted to intervene as parties defendant in the proceedings in the District Court.

Appellees Edwin B. Forsythe, Matthew J. Rinaldo, Millicent H. Fenwick, Harold C. Hollenbeck, James A. Courter, Margaret S. Roukema, and Christopher H. Smith are Republican Members of Congress from New Jersey, and George T. Daggett, Thomas Dunn, Livio Mancino, Rev. Millard D. Birt, Rafael Fajardo, Margaret Dougherty, Maretta N. Jackson, and C. Joseph Lillo were plaintiffs in the proceedings in the District Court.

Appellees Thomas H. Kean, Governor of the State of New Jersey, Irwin Kimmelman, Attorney General of the State of New Jersey, and Jane Burgio, Secretary of the State of New Jersey, were defendants in the District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2057

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the three-judge district court is reported as *Daggett v. Kimmelman*, 535 F.Supp. 978 (D. N.J. 1982). The opinion is reprinted as Appendix A to the Jurisdictional Statement, J.S. 1a-29a. The Order of March 11, 1982, making a technical correction, is reprinted in the Joint Appendix, App. 186.

JURISDICTION

The judgment of the three-judge District Court was entered on March 8, 1982, and appellants (intervening defendants in the court below) filed a notice of appeal the same day. J.S. 30a, 34a. The case was docketed on May 6, 1982, fifty-nine days after the notice of appeal was filed. This Court noted probable jurisdiction on June 21, 1982.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253, and the appeal is timely under 28 U.S.C. § 2101(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 2 of the United States Constitution provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

The New Jersey reapportionment statute, New Jersey P.L. 1982, c.1, is lengthy. It is set forth as an appendix to the District Court's opinion. J.S. 15a-20a.

STATEMENT OF THE CASE

This case presents for review the judgment of a divided three-judge court, which invalidated a legislatively enacted congressional redistricting plan with maximum deviations less than the statistical imprecision of the census data from which the deviations are computed. The redistricting plan—P.L. 1982, c.1—was enacted by the New Jersey Legislature, and signed into law by the Governor on January 19, 1982. As required by the 1980 census figures, it reduced the number of congressional districts in the State from 15 to 14. Using the 1980 census figures as corrected to October 30, 1981,[1] the fourteen congressional

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[1] To date, there are three slightly different census figures available for the State of New Jersey. Preliminary figures released early in 1981 showed a total population of 7,364,158. P. Ex. 1, App. 10 (Table 1). These figures were revised by the Bureau of the Census on October 30, 1981. The new figures increased the population of East Orange (and of the State) by 665 people, and made small adjustments not affecting the state's total population in two towns. P. Ex. 1, App. 5-6. Since the trial we have been informed that the Census Bureau has made an additional correction to the New Jersey figures, which will be published and certified to the Governor soon. This correction, we understand, increases the population of East Orange (and of the State) by an additional 188 people, bringing the total population to 7,365,011. It affects the different plans in different degrees. For example, it infinitesimally reduces the maximum deviation of P.L. 1982, c.1, from 0.698400% to 0.698383%.

The October 30, 1981 figures were used in the District Court and are the basis of the extensive computations by the New

districts created by the Legislature have an average deviation of 0.138%, and a maximum deviation between the largest and the smallest districts of 0.6984%, both less than the statistical imprecision of the census data.[2] J. Ex. 7, App. 152; D. Ex. 5, App. 103-104.

Preliminary certified 1980 census figures were available in New Jersey early in 1981. P. Ex. 1, App. 4. State Assembly and Senate districts were thereafter reapportioned first. J. Ex. 3 at 28-32 [hereafter "Karcher Deposition"]. In April or May of 1981, the leadership turned to the question of congressional redistricting, and instructed legislative staff to begin developing plans for the Legislature's consideration. *Id.*, at 42-46.[3]

The primary factor, for legislative leaders and in directions to the staff, was population equality among districts. *See, e.g., id.* at 23-25, 42-43; J. Ex. 1 at 13 [hereafter "Feldman Deposition"]; J. Ex. 2, at 13 [hereafter "Jackman Deposition"]; D. Ex. 1, App. 81-83. The leadership determined that no plan with a deviation over 1% would even be considered. Karcher Deposition at 56. Moreover, dilution of the minority vote was to be avoided throughout the State, and particularly in Newark, which

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Jersey Office of Legislative Services which appear in Joint Exhibits 4-7, App. 119-173. Since the differences are, in our view, trivial, and since conversion to the most current figures would require extensive recalculation, we will continue to use the October 30, 1981 figures in this brief except where specifically noted otherwise.

[2] The "average deviation" is the sum of the deviations from ideal size of all districts, divided by the number of districts, and expressed as a percentage of the size of the ideal district. The figure given in text was computed from figures in J. Ex. 7, App. 152. The "maximum deviation" is the difference in size between the largest and smallest districts, expressed as a percentage of the size of the ideal district.

[3] The Legislature was primarily occupied with state budgeting from April to the end of June, and thereafter was in recess until after the November elections.

contains the State's highest proportion of minority voters. D. Ex. 1, App. 81-84; D. Ex. 2, App. 86-90; Feldman Deposition at 40-43, 79-80; Jackman Deposition at 12-14, 131-134. Two other factors, political fairness, Feldman Deposition at 24-25, 91-94, and preserving New Jersey municipal boundary lines,[4] Jackman Deposition at 91-92, were adopted in drawing the districts embodied in P.L. 1982, c.1.

The full Legislature grappled with redistricting when it reconvened in November, 1981.[5] In December of that

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[4] In fact all of the plans before the District Court and the Legislature preserved municipal boundary lines.

[5] In August of 1981, Dr. Ernest Reock, a faculty member at Rutgers University, had sent copies of his proposed redistricting plan to all members of the Legislature and to various other political officials and legislative staff in the state. P. Ex. 1, App. 4-5. Dr. Reock received oral acknowledgements of receipt from several legislators, and a lengthy letter on the stationery of then Speaker of the Assembly Jackman. *Id.* at 5, 35-41; *see* Jackman Deposition 39, 135-137. He received no other communications, written or oral, from legislators of either party. P. Ex. 1, App. 5.

The District Court's opinion may create some misunderstanding regarding Dr. Reock's plan. The plan Dr. Reock mailed to members of the Legislature and others in August, 1981, was based on the preliminary New Jersey census figures and, using those figures for computation, had a maximum deviation of 0.325%. P. Ex. 1, App. 5. However, those figures were inaccurate. The Census Bureau revised its figures on October 30, 1981. P. Ex. 1, App. 5-6. Using the revised figures, Dr. Reock's plan had a maximum deviation of 0.451%. *Id.* at 6.

After the present lawsuits were filed, Dr. Reock revised his plan on February 16, 1982. *Id.* This revised plan, which does not appear to have been sent to any members of the Legislature and which, of course, was not in existence when P.L. 1982, c.1, was enacted, has a maximum census population deviation of 0.296%. *Id.*

The District Court's reference, Opinion, 535 F. Supp. at 981, 982, J.S. 5a, 8a, to Dr. Reock's plan "as amended" is thus a reference to a version of that plan not in existence until after plaintiffs filed this lawsuit. The District Court's reference, Opinion, 535 F. Supp.

year, both houses passed a bill that was vetoed by Governor Byrne. The Legislature then enacted another bill, which was signed into law on January 12, 1982. N.J. Laws 1981, c. 561. There was considerable dissatisfaction with the law, particularly because of its treatment of Bergen County. *See, e.g.*, Feldman Deposition at 68-73. The new Legislature took office on January 12 and responded to this concern by enacting P.L. 1982, c.1, which was signed by the Governor on January 19, 1982.

On February 2 and 9, 1982, plaintiff-appellees brought these actions against the State appellees to declare P.L. 1982, c.1, unconstitutional and to enjoin its use. The cases were consolidated, appellants were permitted to intervene as defendants, and the case was submitted on depositions, affidavits and exhibits without a trial. On March 3, 1982, the three-judge District Court by a divided vote declared P.L. 1982, c.1 unconstitutional.[6] Judgment was entered on March 8, 1982. J.S. 30a.

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at 982, J.S. 8a, to Dr. Reock's original plan as containing a "total deviation of .3250%" is misleading because it uses the inaccurate, original census figures for New Jersey as a basis for computation. See note 1, *supra*. Using the October 30, 1981 census figures—the figures used in computation for all other plans—the correct figure should be .451%. P. Ex. 1, App. 6.

[6] The District Court's opinion contains several typographical errors with regard to the figures concerning P.L. 1982, c.1. As originally issued, and as reprinted in the Jurisdictional Statement, the opinion contains the following passage:

> The Fourth District contains the greatest variance in excess of the "ideal" district: 1,413 people or .2666%. The Sixth District contains the greatest variance below the ideal district: 1,290 people, or .2452%.

J.S. 9a. On March 11, the District Court entered an order amending the Sixth District figures to "2,261 people, or .4298%." App. 186. Although not amended by the District Court, it appears from the record that the deviation figure for the Fourth District should be .2686%. J. Ex. 4, App. 124.

The District Court read *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *White v. Weiser*, 412 U.S. 783 (1973), as invalidating any legislatively drafted congressional redistricting plan if it is possible that a plan with smaller census population deviations could be developed. Opinion, 535 F. Supp. at 981-982, J.S. 7a-8a. The court found that several other plans (some introduced in the Legislature before P.L. 1982, c.1, became law and others introduced later or not at all) existed with lower census population deviations. Opinion, 535 F. Supp. at 982, J.S. 8a. The court gave no consideration to defects in the other plans. It also concluded that even if preventing dilution of minority voting strength was a legitimate consideration justifying deviation from absolute census population equality, that justification was absent in this case because the district with the largest black population (District 10, containing Newark) was not one of those with the highest deviation, and because the city of Orange was not included within the district. *Id.* at 982-983, J.S. 9a-10a. Finally, the District Court rejected appellants' argument that *Kirkpatrick* and *White* are satisfied when the Legislature's plan shows deviations from absolute census population equality that are less than the statistical imprecision of the census. *Id.* at 983, J.S. 10a. The District Court enjoined the state officials from holding any election under P.L. 1982, c.1, gave the Legislature until March 22, 1982 to enact a new redistricting statute, and stated that if the Legislature did not "this Court will convene on March 26, 1982 to undertake further proceedings." *Id.*[7]

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[7] The District Court's opinion does not speak directly to the state-law question whether, if the redistricting plan of P.L. 1982, c.1 is declared unconstitutional, effect should still be given to Section 3 of the act, which repealed the prior redistricting act, P.L. 1981, c. 561.

Circuit Judge Gibbons dissented. He would have held that where the deviation between districts is less than the recognized statistical imprecision of the census, a good faith effort to achieve true population equality has been shown as a matter of law:

> [T]he only relevant constitutional consideration, in the absence of a much needed federal statute imposing standards for congressional districting, is the achievement of equal representation for more or less equal numbers of persons. A deviation in population between the largest and the smallest district of 0.6984% is smaller than the recognized margin of undercounting in the census. I would hold that achievement of that small a deviation demonstrates as a matter of law a good faith effort to achieve equal member districts.

Opinion, 535 F. Supp. at 985, J.S. 14a (dissent).

The District Court denied appellants' motion for a stay pending appeal. J.S. App. 33a. On March 15, 1982, Justice Brennan stayed the District Court's judgment. J.S. 36a-41a. On March 29, this Court denied motions to vacate the stay or, in the alternative, to expedite the proceedings. J.S. 42a. On April 13, Justice Brennan denied a motion to modify the stay. J.S. 43a. This Court noted probable jurisdiction of the appeal on June 21, 1982.

SUMMARY OF ARGUMENT

The District Court should not have invalidated the congressional redistricting plan duly enacted by the New Jersey State Legislature, P.L. 1982, c.1. This Court has repeatedly emphasized—and only last Term reiterated—that the primary role in redistricting must be left to the legislatures, which alone are entrusted with a mandate to reconcile the various and often competing affected interests. If legislatures are to fulfill that role, they must be

allowed some latitude to choose among several possible redistricting plans. In making a choice within that latitude, a legislature need not adopt any particular plan merely because it achieves the smallest apparent deviation, irrespective of other concerns important to the citizens of the State. This is particularly true where, as in this case, the differences among competing plans are within the statistical imprecision of the census.

As with any measuring instrument, the census contains an unavoidable statistical imprecision. Within that margin, there is no way to discern whether minute changes in the apparent size of district populations would or would not actually advance the goal of population equality of congressional districts. Deviations less than the statistical imprecision of the census data are the functional equivalent of zero. Where the overall deviation of a legislatively enacted redistricting plan is less than the statistical imprecision of the census data, the legislature has created districts "as mathematically equal as reasonably possible," *White v. Weiser*, 412 U.S. 783, 790 (1973), and the legislative plan should be upheld.

Instead, the divided District Court applied a standard which ignored the limitations in the census enumeration process, and if applied nationwide would place in jeopardy the majority of plans adopted by state legislatures using the 1980 census data. Employment of the District Court's standard would reduce the sensitive political judgments involved in redistricting to a contest among computer programmers. The constitutional requirements of Article I, § 2, ought not to be reduced to such an illusory quest for mathematical precision.

Even if legislatures were required to reach closer to apparent equality of districts based upon available census population figures than the statistical imprecision of the

census, P.L. 1982, c.1, should still be upheld. All the alternative plans, whether available to the New Jersey Legislature at the time it acted or developed thereafter, contained serious flaws, which ought to disqualify them even if the census population deviations of the alternative plans were minutely smaller. Some plans omitted portions of the State; others included the same municipality in more than one district. Even competing plans without technical defects were flawed because each of them would have diluted minority voting strength in one or more of the areas of New Jersey in which minority votes are a potentially significant factor.

As the uncontroverted evidence in this case reveals, the New Jersey Legislature sought to achieve population equality in adopting P.L. 1982, c.1. It chose that bill over plans favored by appellees because it best reflected the interests of the black leadership in New Jersey who sought to preserve minority voting strength. Moreover, the minute deviations in P.L. 1982, c.1, are well within the statistical imprecision of the census data. Consequently, the New Jersey Legislature made a "good faith effort to achieve precise mathematical equality," *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969), within the limits of the accuracy of the census data, as required by this Court's previous decisions. Its efforts should be upheld and the redistricting plan sustained.

ARGUMENT

I. LEGISLATIVE POLICY IS A FACTOR OF PRIMARY IMPORTANCE IN CONGRESSIONAL REDISTRICTING, FOR WHICH THE DISTRICT COURT'S STANDARD LEAVES NO ROOM.

A. This Court's prior cases establish that legislative policy is a primary factor in redistricting cases.

This Court has always recognized that "reapportionment is primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).[8] Reapportionment is not merely an exercise in long division. Rather, "dealing as it must with fundamental 'choices about the nature of representation,' [it] is primarily a political and legislative process." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (state legislative apportionment), *quoting Burns v. Richardson*, 384 U.S. 73, 92 (1966). Those choices include whether to develop new districts from a clean slate, or to attempt to preserve existing constituencies as much as feasible; how communities of interest should be defined and grouped; how minority voting rights should be protected; and whether or not attempts should be made to preserve municipal

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[8] *Reynolds*, of course, like most of this Court's cases involving the relative size of election districts, involved a challenge under the Equal Protection Clause to districts from which state officials were elected. *Wesberry v. Sanders*, 376 U.S. 1 (1964), holds that challenges to the relative size of congressional districts are primarily governed by Article I, § 2's command that representatives be elected "by the People." However, the principle of deference to state legislative judgment applies in congressional districting cases as well:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that *a district court should similarly honor state policies in the context of congressional reapportionment.*

White v. Weiser, 412 U.S. 783, 795 (1973) (emphasis supplied).

boundaries. If seats in Congress have been lost, the legislature must decide how many incumbents should be forced to run against each other—and who these incumbents should be. Because of the intensely local and hotly political nature of such questions, this Court has held that a legislature should, if possible, be given time to enact a constitutional plan before a court ordered remedy is imposed. *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964); *Reynolds v. Sims*, 377 U.S. at 587. And where a court ordered remedy is required, that remedy must honor state policies to the extent possible. *White v. Weiser*, 412 U.S. 783, 795-796 (1973).

A legislature's choices of policies to be followed in redistricting are so tied to local preferences—and at the same time so important to citizens of the State—that this Court has already indicated that those policies are more important than minuscule differences in deviation from absolute census population equality. In *White v. Weiser*, 412 U.S. 783 (1973), one question presented was whether the District Court erred in choosing "Plan C" over "Plan B" once it had concluded that the legislature's previously enacted plan was unconstitutional. Plan B adhered more closely to the legislature's lines; it also embodied a smaller deviation from equality than Plan C. 412 U.S. at 786-788. The Court held that Plan B should have been adopted:

> Here, it is clear that Plan B, to a greater extent than did Plan C, adhered to the desires of the state legislature while attempting to achieve population equality among districts. S.B. 1 [the unconstitutional plan] . . . established the State's 24 congressional districts with locations and configurations found appropriate by the duly elected members of the two houses of the Texas Legislature. As we have often noted, reapportionment is a complicated process. *Districting inevitably has a sharp political impact and inevitably political decisions must be made by those charged with the task.* . . .

> . . . Despite the existence of Plan B, the District Court ordered implementation of Plan C, which, as conceded by all parties, ignored legislative districting policy and *constructed districts solely on the basis of population considerations. The District Court erred in this choice.*

412 U.S. at 795-796 (citation omitted) (emphasis added).

Although the Court noted that Plan B also achieved greater census population equality than Plan C,[9] the whole thrust of the Court's discussion of the two plans is that Plan B was preferable not because of its smaller variance, but because it more closely adhered to the legislature's desires. If census population equality had been the only relevant factor, most of the discussion in *White* would have been entirely unnecessary.[10]

The principles of *White v. Weiser* were unanimously reaffirmed only last Term, in *Upham v. Seamon*, —— U.S. ——, 102 S. Ct. 1518 (1982):

> "[A] district court should . . . honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'"

Id. at ——, 102 S. Ct. at 1521, *quoting White v. Weiser*, 412 U.S. at 795. The Court concluded that any court ordered remedy should follow as closely as possible the legislative plan, with changes limited to "those necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, —— U.S. at ——, 102 S. Ct. at 1522.

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[9] "Indeed, Plan B achieved the goal of population equality to a greater extent than did Plan C." 412 U.S., at 796. The difference in deviations between the two plans was 0.125%. Computed from 412 U.S. at 786-787.

[10] *Accord, Doulin v. White*, 535 F. Supp. 450, 451 (E.D. Ark. 1982); cf. *In re Pennsylvania Reapportionment Cases*, 535 F. Supp. 191 (M.D. Pa. 1982).

To be sure, both *White* and *Upham* arose in the context of formulating a judicial remedy once it had been determined that a redistricting plan enacted by the legislature had been found unconstitutional. But the logic of their principles applies *a fortiori* to the initial question whether a legislatively enacted plan is constitutional, since this Court has repeatedly stated that legislatures have a wider latitude in the formulation of redistricting plans than courts. *E.g., Upham v. Seamon*, —— U.S. at ——, 102 S. Ct., at 1522; *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Were *White* and *Upham* to be limited to remedies, a court might be placed in the incongruous position of ordering implementation of a plan that it would have had to condemn if enacted by the legislature. And if the constitutional standard were so strict as to leave no room for the interplay of legislative forces, then a legislature's plan could contain no state policies worth deference from the district courts. *White* and *Upham*, therefore, stand for the proposition that adherence to legislative political choices is preferable to obtaining a minute reduction in census population deviation. Where, as here, the differences among competing plans are less than the statistical imprecision of the census data, a legislature is not compelled to abdicate its role and automatically adopt whatever policies are embodied in the plan with the smallest census population deviation.

B. The District Court's standard in this case leaves no room for the exercise of legislative discretion.

The standard applied by the District Court in this case leaves no scope for a legislature to exercise any judgment, let alone to implement any state policies. The District Court found that the population deviation in P.L. 1982, c.1, was "not unavoidable" solely because the "legislature had the option of choosing from several plans with a lower total deviation." Opinion, 535 F. Supp. at 982, J.S. 8a. The District Court reached this conclusion despite the fact that the improvement achieved by the available alternatives was less than the statistical im-

precision of the census, and thus meaningless. See Section II(A), pp. 15-18 below. Moreover, it did so without considering whether the alternative plans adopted met the Legislature's legitimate objectives to the same extent as P.L. 1982, c.1. See Section III, pp. 27-34 below.

Consequently, the District Court's standard—that the legislature acts unconstitutionally unless it adopts that plan which has the smallest census population deviation—leaves no opportunity to implement state policies or exercise legislative judgment. Under the District Court's standard, a legislature will have but one plan to choose from,[11] the one with the smallest census population deviation, no matter how insignificant the differences among alternative plans, and without regard to other legitimate state policies that shaped the districts in the alternative plans. This, as we show in Sections II and III below, is not required by the Constitution or any decisions of this Court, and is contrary to this Court's admonition that legislative policies other than population equality are also important in drawing redistricting plans.

II. LEGISLATURES MAY CHOOSE AMONG REDISTRICTING PLANS WITH STATISTICALLY INSIGNIFICANT DEVIATIONS, AND ARE NOT, AS THE DISTRICT COURT ERRONEOUSLY HELD, REQUIRED TO ACCEPT WHATEVER PLAN HAS THE SMALLEST DEVIATION.

A. The 0.6984% deviation in this case is within the statistical imprecision of the census data, and therefore is the functional equivalent of zero.

If the 1980 Census were an entirely accurate enumeration of the population, it could be said with assurance

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[11] Indeed the District Court appears to have gone even further. It cited two plans which were not before the Legislature until after the passage of P.L. 1982, c.1. It thus indicated it might invalidate a reapportionment plan whenever there was before the *court* a plan with a smaller census population deviation, whether or not the plan had been before the legislature. See Section III(B), pp. 30-34 below.

that P.L. 1982, c.1, contains a maximum deviation from absolute equality of districts of 0.6984%—less than seven tenths of one per cent. In fact, however, because of the statistical imprecision in the census data this is surely not the true deviation from absolute equality. For it is universally recognized that the Census is not and cannot be made an entirely accurate measure of population. *See, e.g.*, National Academy of Sciences, National Research Council, *Counting the People in 1980: An Appraisal of Census Plans* 1 (1978) [hereafter cited as NAS Study].[12]

As this Court has recognized in the past, there is a small—but inevitable—statistical imprecision in any census. "These figures may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). The imprecision is due primarily to undercounting the population—some people are simply missed by the census-takers.[13] The National Academy of Sciences notes that "it is virtually impossible to count every single inhabitant of the United States—at any cost." NAS Study at 1. Further, this undercount is not negligible. The NAS states that "far from being able to count the population to the last person, a statistical agency cannot count it to the last million persons." *Id.*

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[12] Although not reprinted in the Joint Appendix, this publication appears as Exhibit 2 to Dr. Trussell's statement, D. Ex. 5, and is part of the record in this case.

[13] Occasionally, although less often, a particular group may be overcounted. Overcounting can occur either (1) because some individuals are actually counted twice, or (2) because incorrect information was provided: if a 55-year-old man reports his age as 65, the 65 and over group will be overcounted (and the 55 to 64 group undercounted). The second type of overcounting will change the total population reported for a particular area only if the incorrect information relates to the area in which the individual resides.

at 93. The undercount error in the 1980 census is likely to be more than 2 million people nationwide, D. Ex. 5, App. 103, and may be as high as 5 million. J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population in the 1980 Census, by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis* 3-7 (1982) (Current Population Reports, Special Studies P-23, No. 115, 1982) [hereafter cited as "Passel *et al.*"].[14]

Although one can estimate—and theoretically compensate for—the undercount on a national level, such adjustments become much more difficult on a state or local level. The accuracy of estimates of the undercount decreases for smaller areas, and thus the adjustment that would be required becomes harder to determine. *See* D. Ex. 5, App. 99, 101, 103. Local adjustments are more difficult than national ones because the undercount varies for different segments of the population, and is not distributed equally among States or within different areas inside any State. *Id.*

For example, preliminary 1980 estimates suggest an undercount of about 1.5% for white men aged 35 to 54, but about 15% for black men of the same age. Passel *et al.* at 7. The undercount for any given area, such as a district within New Jersey, thus depends on the demographics of that particular area, *see* D. Ex. 5, App. 103; in this example, the relative percentage of white and black men in the district. But a specific area's undercount also depends on how uniformly the undercount for each demographic group is distributed nationwide. NAS Study at 98. Just because 15% of black men aged 35 to 54 were not counted by the Census nationwide does not mean that 15% of this group were missed in any par-

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[14] Although not reprinted in the Joint Appendix, a preliminary print of this report appears as Exhibit 6 to Dr. Trussell's statement in the record in this case. The report has since been published.

ticular district. Thus, the estimate of the undercount for a given locality is indeterminate because it depends not only on the degree, but also on the distribution of the nationwide undercount in that specific locality, D. Ex. 5, App. 103. It is this indeterminacy which is the inevitable statistical imprecision of the census. In short, for any given area, the precise number of persons is unknowable.

The net result is that accurate corrections for undercounting are impossible to make at the local level. Indeed, in *City of Newark v. Blumenthal*, 457 F. Supp. 30, 34 (D.D.C. 1978), Judge Gesell on an extensive record concluded just that. *See Gaffney v. Cummings*, 412 U.S. 735, 745-746 and n. 10 (1973). At the municipal level involved in this case, census population figures therefore contain an uncorrectable statistical imprecision, estimated by Dr. James Trussell of Princeton University to be about 1% Although presented with delusive precision, census figures are not precise and cannot be made so. Where, as here, the deviation from ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero. It is unkown—and in practice unknowable—whether a small change in the apparent variation between districts will in fact increase or decrease the real degree of population equality between districts. As Dr. Trussell put the matter, without contradiction,

> [It is not] meaningful to rank one redistricting plan as superior to another when differences in district size are small. In my professional opinion, districts whose enumerated populations differ from one another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion.

D. Ex. 5, App. 104.

B. A reapportionment plan that contains deviation less than the statistical imprecision of the census data satisfies the standards of Kirkpatrick v. Preisler and White v. Weiser.

The District Court in this case concluded that P.L. 1982, c.1, failed to meet constitutional standards set down in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *White v. Weiser*, 412 U.S. 783 (1973), simply because other plans, before the Legislature or the District Court, had smaller census population deviations. Opinion, 535 F. Supp. at 982, J.S. 8a. The District Court erred, for neither *Kirkpatrick*, *White*, nor any other decisions of this Court, require a legislature to adopt, automatically, the plan with the smallest apparent deviation among plans *all* of which have deviations less than the statistical imprecision of the census.

Article I, § 2 of the Constitution commands "that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). This fundamental constitutional rule was interpreted in *Kirkpatrick* as "requir[ing] that the State make a good-faith effort to achieve precise mathematical equality." 394 U.S. at 530-531. In *Kirkpatrick*, the Court found that the legislature had not met the standard. The plan adopted had a deviation of 5.97%, and the "simple device of switching some counties from one district to another would have produced a plan with *markedly reduced* variations." *Id.* at 529 (emphasis supplied). The principle of unavoidability was further clarified in *White v. Weiser*. Striking down a plan embodying deviations of 4.13%, the Court explained that a congressional reapportionment plan cannot pass the constitutional test if "the districts [are] not as mathematically equal as *reasonably* possible." 412 U.S. at 790 (emphasis supplied).

There is no reason to read these cases, in commanding "a good-faith effort to achieve precise mathematical equality," *Kirkpatrick v. Preisler*, 394 U.S., at 530-531, as insisting the Legislature engage in an elusive quest for more precision than the data will permit. As we have shown in Part II(A) above, P.L. 1982, c.1, creates congressional districts that are *precisely equal to the degree of precision justified by the census data.* This is because there exists no way of knowing which of several plans with census population deviations less than the statistical imprecision of the census is, in fact, most equal. To recognize this fact in no way denigrates "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives," *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). Congressional redistricting is not and should not be an exercise designed merely to produce the illusion of precision. *Kirkpatrick* and *White*, commanding that congressional districts be "as mathematically equal as reasonably possible," *White*, 412 U.S. at 790, require no more precision than the mathematics of the census data will allow.

Nevertheless, Appellees Forsythe *et al.* argue that "reliance on the census for determination of congressional representation is mandated by the Constitution." Motion to Affirm at 13. Assuming that Appellees mean that census figures *must* be relied on for congressional districting within a given State, their argument is wrong under the language of the Constitution, the applicable Acts of Congress, and prior decisions of this Court. Appellees' proposed rule would add nothing of substance to the worth of a citizen's vote, nor would it ease the task of legislatures and courts in the redistricting process.

Article 1, section 2, clause 3 of the Constitution provides that

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . .[15]

This language arguably requires that the census figures be used to apportion Representatives *among* the several States. But it speaks not at all to the apportionment of Representatives *within* a given State. As this Court held in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that question is governed by the constitutional language requiring that members of the House be elected "by the People." Article I, section 2, clause 1. And the constitutional language has been so understood by Congress. The Department of Commerce is required by statute to report total census figures by State, "as required for the apportionment of Representatives in Congress among the several States," within 9 months of the census date. 13 U.S.C. § 141(b). By contrast, use of census figures for redistricting within States is optional. 13 U.S.C. § 141(c).[16]

Moreover, in *Kirkpatrick v. Preisler*, this Court explicitly stated that census data need not be relied on if, for example, there had been shifts in population within the State since the census was taken. 394 U.S. at 535. Indeed, reliance on census data in *Kirkpatrick* seems to

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[15] The first sentence of this clause no longer governs apportionment of Representatives among the several States, which is now controlled by Section 2 of the Fourteenth Amendment.

[16] Under 13 U.S.C. § 141(c), States that desire to have census data reported on the basis of local boundaries, *e.g.*, voting precincts, are allowed to submit plans identifying particular geographic areas for which specific tabulation is requested. Plans submitted by the states are reviewed by the Secretary of Commerce. Tabulations under plans submitted by a State and approved by him must be completed and reported to the State involved with particular dispatch.

have been due entirely to the fact that the Court in that case found that census data was the most reliable data available at the time. *See* 394 U.S. at 529, 532. *Kirkpatrick*, in other words, commands that census data be used for what it is worth: no more and no less.[17] That is precisely the point we urge in this case.

Finally, cogent reasons of policy argue against any rule that States be required, no matter what the reality, to rely solely upon census figures in congressional redistricting. Any such rule would command malapportionment whenever census data were inaccurate. This would be a cruel mockery of the principle of equality commanded by *Wesberry v. Sanders* and its progeny. Moreover, such a rule would produce no benefits in the form of increased certainty or simplicity in the redistricting process. Census figures are not fixed. The New Jersey figures, for example, have changed twice since they were initially released. See note 1, above. Appellees' proposed rule would require redistricting whenever the Department of Commrce revised the census figures.

C. The District Court's standard imperils most of the redistricting plans adopted by state legislatures under the 1980 Census.

The District Court held that (absent special justification) a legislature must draw congressional districts so that they are as close as mathematically possible to absolute census population equality. If that stringent standard were followed across the country, most and possibly all of the redistricting plans adopted by state legislatures would fall unless the legislature could show special justification for every deviation.

As far as we have been able to determine, 31 state legislatures to date have completed congressional redis-

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[17] Where there are known inaccuracies in the census data, this Court has permitted corrective measures to be taken. *Mahan v. Howell*, 410 U.S. 315, 330-333 (1973) (state legislative reapportionment). *See also Burns v. Richardson*, 384 U.S. 73, 91-92 (1966) (Equal Protection Clause does not require use of census figures).

tricting plans based on the 1980 census.[18] Eleven of these States have adopted plans with a higher deviation than that presented here,[19] and four others have deviations

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[18] Six states—Alaska, Delaware, North Dakota, South Dakota, Vermont and Wyoming—have but a single congressman and therefore no need to redistrict. Two states—Maine and Montana—will not redistrict until 1983. M. Stephens, *Common Cause Report on Congressional and State Redistricting* 9 (No. 2, June 1982) [hereafter cited as "Common Sause Report"]. Seven States are under court-ordered redistricting plans after the legislature failed to enact any plan: Colorado, *Carstens v. Lamm*, No. 81-F-1713 (D. Colo. Jan. 26, 1982); Illinois, *Ryan v. Otto*, 50 U.S.L.W. 3546 (Jan. 11, 1982) (mem.); Kansas, *O'Sullivan v. Brier*, 540 F. Supp. 1200 (D. Kan. 1982); Michigan, Common Cause Report 16; Minnesota, *Orwoll v. LaComb*, 50 U.S.L.W. 3915 (May 17, 1982) (mem.); *Schatzle v. Kirkpatrick*, 50 U.S.L.W. 3915 (May 17, 1982) (mem.); and South Carolina, *South Carolina State Conference v. Riley*, 533 F. Supp. 1178 (D.S.C. 1982). The California legislature adopted a plan, but it failed a referendum on June 8, 1982, and thus will be in effect only for the 1982 elections. *Assembly v. Dukmejian*, 30 Cal. 3d 638, *appeal dismissed and cert. denied sub nom. Republican National Committee v. Burton*, 50 U.S.L.W. 3857 (April 26, 1982).

Redistricting Georgia and Mississippi is presently in litigation after objections by the Department of Justice. *Jordan v. Winters*, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeal pending sub nom. Brooks v. Winters*, No. 82-233; Common Cause Report 13. The Hawaii plan has been declared unconstitutional and will be redrawn. *Id.*

[19] Indiana (2.96%); Alabama (2.45%); Tennessee (2.40%); Virginia (1.81%); North Carolina (1.76%); New York (1.64%); Kentucky (1.39%); Washington (1.30%); Massachusetts (1.09%); New Mexico (0.87%); and Arkansas (0.78%). The Arkansas figure is for a court-ordered plan; the original plan adopted by the Legislature had a deviation of 2.10%. *Doulin v. White*, 535 F. Supp. 450, 453 (E.D. Ark. 1982).

Figures for deviations of state redistricting plans are from Council of State Governments & National Conference of State Legislatures, *Reapportionment Information Update* 7 (May 10, 1982), as supplemented by issues of June 4, 1982, and July 23, 1982, unless otherwise specifically noted.

So far as we are aware, only the Arkansas statute is presently under challenge for violating the principle of congressional district equality.

quite similar to New Jersey's.[20] All of these plans would be jeopardized by the District Court's standard, since with leisure for reflection it is virtually certain that *some* reduction of census population deviations could be made to almost any plan.[21] Legislatures would have to ignore municipal boundaries completely, and work with the smallest census units available.[22] Realistically, of course, not every state redistricting plan will be challenged in court. But the District Court's standard, if applied nationwide, would make every state legislature's redistricting plan vulnerable to after-the-fact attack by anyone with a complaint and a calculator.

Significantly, the redistricting plan approved after this Court's decision in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), contained a deviation of 0.629%—virtually the

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[20] Ohio (0.68%); Nevada (0.60%); Oklahoma (0.58%); West Virginia (0.50%). The remaining sixteen states have plans with census population deviations ranging from 0.45% (Connecticut) to 0.02% (Rhode Island).

[21] The state with the smallest deviation among legislatively adopted plans is Rhode Island, whose two districts have a deviation of 0.02%, or about 95 people. The average census block—the smallest unit of census population measurement—has a population of about 70. See note 38 below. If, as seems likely, there is any census block with a census population of 94 or fewer on the boundary between the two districts and in the larger district, moving it to the smaller district would slightly reduce the deviation between the two. Of course, as deviations become larger the possibility of such changes is even greater.

[22] Working with the smallest census units available will, of course, result in the greatest fragmentation of existing political boundaries and thus legislatures typically work in larger blocks. The Congress has, in fact, recognized this and 13 U.S.C. § 141(c), which provides for state input into the geographic divisions which will be used in reporting population figures, contemplates that often States may desire to work with census units larger than the smallest possible ones. In the present case, *all* of the plans before the Legislature and the District Court respected municipal boundaries. Thus, in practice municipalities were the smallest units out of which the plans were built.

same deviation declared unconstitutional by the District Court in this case. *Preisler v. Secretary of State*, 341 F. Supp. 1158, 1162 (W.D. Mo.), *aff'd sub nom. Danforth v. Preisler*, 407 U.S. 901 (1972). Similarly, district courts have upheld plans with larger deviations. E.g., *West Virginia Civil Liberties Union v. Rockefeller*, 336 F. Supp. 394 (S.D.W.Va. 1972) (0.78% average deviation; competing plan would have reduced). In *Doulin v. White*, 535 F. Supp. 450, 451 (E.D.Ark. 1982), the court ordered implementation of a plan with a deviation of 0.78% despite the availability of an alternative (less like the legislature's plan) with a deviation of 0.13%.

D. The District Court's standard substitutes the policies of computer programmers for those of the Legislature.

A consistent theme of this Court's cases dealing with legislative reapportionment has been that, when all is said and done, reapportionment is primarily a matter for legislative judgment, *Upham v. Seamon*, —— U.S. ——, ——, 102 S. Ct. 1518, 1521 (1982); *White v. Weiser*, 412 U.S. 783, 795 (1973); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). "[A] State legislature is the institution that is by far the best suited to identify and then reconcile traditional state policies within the constitutionally mandated framework . . . ." *Connor v. Finch*, 431 U.S. 407, 414-415 (1977).

All redistricting plans enacted by state legislatures possess the virtue of having been promulgated by the elected representatives of the people through the democratic process. Legislatures have a higher function in the redistricting process than to see which computer-generated redistricting plan has the smallest deviation from absolute census population equality. Were this not so, the legislature would become nothing more than an arithmetic assistant to the computer programmers.

In the present case, for example, one of the plans relied on by the District Court to strike down P.L. 1982, c.1, was that devised by Dr. Reock and mailed to every member of the New Jersey Legislature. Opinion, 535 F. Supp at 981, 982, J.S. at 5a, 8a. That plan, of course, embodied considerations other than census population equality alone. Dr. Reock—and not the Legislature—decided what those other considerations should be, and how competing policies should be reconciled. P. Ex. 1, App. 14-22. He, and not the Legislature, decided that compactness of districts was important, and decided precisely *how* important compactness would be. *Id.* at 18. Dr. Reock, and not the Legislature, decided that New Jersey's reapportionment plan should protect incumbent Congressmen to the greatest extent possible by reducing the number of conflicts between incumbents to the absolute minimum—and decided which Congressmen should not be protected. *Id.* at 14-16. And so forth.[23]

To hold that the Legislature's plan should be struck down because the Reock (or any other) plan produces a statistically insignificant "improvement" in census population equality[24] is to hold that the legislatures of the several States—the institutions "by far the best situated to identify and then reconcile traditional state policy," *Connor v. Finch*, 431 U.S. 407, 414-415 (1977)—are constitutionally compelled to adopt the policy choices of that person whose computer program produces the smallest deviation from absolute census population equality. This would make control of fundamental ques-

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[23] In addition to the considerations of which Dr. Reock was aware, it is possible that the method he used to produce his plan, perhaps unknown to him, foreclosed some policy choices or embodied others. This certainly may be so for computer-generated plans in the future. Complex computer programs are not always entirely within the conscious control of their authors and sometimes produce unintended results—as those who have had to deal with computerized billing systems are well aware.

[24] As we have shown above, see pp. 15-18, the "improvement may be wholly illusory.

tions of state policy the prize in a contest among programmers. Where, as in this case, the deviation is within the statistical impression of the census data, to strike the legislature's plan is to substitute other policy choices for those of the legislature.

III. THE DISTRICT COURT INCORRECTLY HELD THAT THE INSIGNIFICANT DEVIATIONS IN P.L. 1982, c.1, WERE AVOIDABLE.

The record establishes without contradiction that the Legislature, in drafting and passing its reapportionment plan, sought to minimize the population deviations. Assembly Speaker Karcher wanted to minimize the population deviations among districts. Opinion, 535 F. Supp. at 981, J.S. 6a. The sponsor of P.L. 1982, c.1, Senator Feldman, indicated that he wanted deviations as close to zero as possible. *Id.* The deviation in the plan which was ultimately passed was below one percent, well within the statistical imprecision of the Census, and certainly within the range of deviations approved in other contexts by this Court and other district courts. See Section II(C), above. Nevertheless, the District Court found that these small deviations were avoidable solely because the "legislature had the option of choosing from several other plans with a lower total deviation." *Id.* at 982, J.S. 8a.

The court reached this conclusion on the basis of two plans which were before the Legislature, the Hardwick Plan (A-3817) and the DiFrancesco Plan (S-3547),[25] and

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[25] Dr. Reock's plan, also referred to by the District Court, was sent in its original form to all members of the Legislature by Dr. Reock, but was never introduced as he proposed it. The Hardwick Plan (A-3817) was a modified version of the Reock plan. P. Ex. 1, App. 5. As we have pointed out, the District Court's references to Dr. Reock's plan are somewhat misleading, since the District Court used the wrong figures in referring to its deviation. And the "amended" form of Dr. Reock's plan, also referred to by the District Court, was prepared after this litigation was commenced and apparently has never been presented to the Legislature. See note 5 above.

two plans which were introduced after the passage of P.L. 1982, c.1: the Bennett II Plan (A-614) and the Kavanaugh II Plan (A-615). Opinion, 535 F. Supp. at 982, J.S. 8a. In addition to the plans mentioned by the District Court, there were two other plans before the Legislature with smaller census population deviations than P.L. 1982, c.1. These were the Kavanaugh I plan (A-3776), and S-3328/A-3646.[26] J. Ex. 7, App. 151, 154, 160. However, none of these plans demonstrates that the deviation in P.L. 1982, c.1, was avoidable because each one contains serious flaws. The Legislature was not required to adopt them.

A. The alternative plans before the Legislature, including those relied upon by the District Court, were flawed.

The four plans with lower census populations deviations which were before the New Jersey legislature when it adopted P.L. 1982, c.1, including the two cited by the District Court, would have diluted minority voting strength, either in the Tenth District (Newark), which is the only black majority district, or in the Fourth District (Trenton), which is the district with the second highest concentration of black voters.

Under the congressional apportionment based on the 1970 census, the district which included the City of Newark was about 60% black in 1980. Bureau of the Census, *1980 Census of Population & Housing (New Jersey)* 15 (Advance Reports, March 1981). Due to a decline in

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[26] Three other plans before the legislature and relied upon by plaintiffs contained defects which clearly disqualified them. S-3549/A-3734 left out Hunterdon County altogether. J. Ex. 7, App. 159. S-3538/A-3767 included three municipalities twice. *Id.* at 161. A-3772 left out Monroe Township in Gloucester County, and placed the municipality of Magnolia in a district with which it was not contiguous. *Id.* at 165; J. Ex. 6, App. 146. Other plans had higher population deviations than P.L. 1982, c.1. J. Ex. 4, App. 123-133.

the black population of Newark between 1970 and 1980,[27] and the increase in the ideal district population, some decline in the black voting strength of this district was inevitable. Thus, under P.L. 1982, c.1, this district, the Tenth District, is 54.8% black. J. Ex. 7, App. 168. However, three of the plans with smaller population deviations would have reduced the black voting strength in the Newark district even further. Two of them, the Kavanaugh I Plan (A-3776) and S-3328/A-3646, reduced black voters to a minority in the district—46.3% and 38.7%, respectively.[28] J. Ex. 7, App. 171, 169. The third plan, the DiFrancesco Plan (S-3547)[29] retained a black majority in the district, but just barely: 52.8%. *Id.*, App 172. This would have further decreased the likelihood of black control of the district.

The Hardwick Plan (A-3817),[30] while not reducing minority votes in the Newark district, diluted the minority vote in the next largest black district, the Trenton district. Under the Hardwick plan, the Trenton district is 11.9% black, while under P.L. 1982, c.1, it is 17.3% black. D. Ex. 4, App. 94. In addition, those municipalities in Burlington County which are excluded from the Trenton district of A-3817 have rapidly increasing black populations. *Id.*, App. 94-95. Black political leaders thought those differences were important. *Id.* Thus, under P.L. 1982, c.1, black voting strength in the Trenton

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[27] In 1970, the population of Newark was reported as 382,417, people, 207,458 black. 1 Bureau of the Census, *1970 Census of Population, Part 32 (New Jersey)*, § 1, at 71 (Table 23) (March 1973). In 1980 there were 191,743 black people in Newark, out of 329,248 people. Bureau of the Census, *1980 Census of Population & Housing (New Jersey)* 6 (Advance Report, March 1981).

[28] These plans were not cited by the District Court.

[29] This plan was cited by the District Court. Opinion, 535 F. Supp., at 982, J.S. 8a.

[30] This plan was cited by the District Court, Opinion, 535 F. Supp. at 982, J.S. 8a.

district can be expected to increase over the next 10 years, while under A-3817 it would have been likely not to increase, or to increase more slowly.[31]

The existence of these plans therefore does not show that the population deviations were avoidable. P.L. 1982, c.1, protects the minority vote from dilution better than any of these plans.[32] In view of their dilution of minority voting strength, they were not viable alternatives to P.L. 1982, c.1. Thus, they do not provide support for the District Court's conclusion that the census population deviation in P.L. 1982, c.1, was avoidable.

B. The alternative plans not before the Legislature, relied upon by the District Court, were also flawed. In any event, they should not have been considered by the District Court.

In concluding that the New Jersey Legislature had not made a "good-faith effort to achieve precise mathematical equality," *Kirkpatrick v. Preisler*, 394 U.S. at 530-531, the District Court relied upon two bills—the Bennett II plan (A-614) and the Kavanaugh II plan (A-615)—which were not before the Legislature when P.L. 1982, c.1, was enacted.[33] It also relied on the

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[31] The Reock plan, also cited by the District Court, was never introduced as proposed by Dr. Reock. However, the Hardwick plan (A-3817) is a modified version of that plan. Like the Hardwick plan, the Reock plan excludes from the Trenton district (District 13 in Dr. Reock's nomenclature) 14 municipalities from Burlington County which are included in the Trenton district (District 4) in P.L. 1982, c.1. *Compare* P. Ex. 1, App. 23-34, *with* P.L. 1982, c.1, J.S. 16a.

[32] D. Ex. 2, App. 86-89; D. Ex. 3, App. 91-92; D. Ex. 4, App. 93-96.

[33] Appellees Forsythe *et al.* suggest that these bills were before the legislature when P.L. 1982, c.1, became law. Motion to Affirm at 10 n.3. It is true that they were proposed for introduction on January 18, 1982 [illegible] day before the Governor signed P.L. 1982, c.1. However, the bill passed the Assembly on January 18. Moreover, A-614 and A-615 were not introduced, that is, given their first

amended version of Dr. Reock's plan, which was not prepared until after this litigation was commenced.

These plans not before the Legislature but relied on by the District Court contained flaws of their own. The amended version of Dr. Reock's plan, in addition to containing Dr. Reock's own views on such matters as continuity, "political fairness," compactness, and so forth,[34] was still substantially the same as the Hardwick plan, and contained the same flaws. *See* pp. 29-30 above. The Bennett II plan (A-614) and the Kavanaugh II plan (A-615) both had somewhat smaller proportions of black voters in the Newark District than P.L. 1982, c.1, and substituted predominantly white suburbs for South Orange and Hillside. J. Ex. 7, App. 166, 168, 170. Had they been available for consideration, they would have been rejected because of the same opposition by the State's black political leadership. *See* D. Ex. 2, App. 86-89. These bills, although never considered, contained flaws very nearly identical with other bills quite properly rejected. Even if the District Court was justified in considering them, they give no support to its conclusions.

Moreover, the District Court should not have considered plans not before the Legislature in making its judgment. To begin with, it is hard to see how the good faith of the legislative effort can be impugned on the basis of plans that were not available for legislative consideration. A legislature that makes a good-faith effort to achieve population equality, and in fact comes very close to that goal, should not be blindsided by alternatives that it had no chance to consider.

This is the rule with regard to review of decisions of trial courts, and the reasons for the rule are equally ap-

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reading, until February 1, 1982. J. Ex. 4, App. 123. It is clear they could not have been considered by legislators deciding how to vote on P.L. 1981, c.1.

[34] See p. 26 above.

plicable to judicial review of the good faith of legislatures making redistricting decisions. "It is the most fundamental rule of appellate procedure that a party may not sit idly by and allow the trial court to commit error, wait for a verdict, and complain of error only if the verdict is unfavorable." *Skogen v. Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967); *see United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). The purposes of the rule are "(1) to [apprise] the court of the litigant's position so that the court in the furtherance of justice might correct its ruling where shown to be in error; and (2) to permit an opponent to obviate the defect where possible." 5A J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 46.02, at p. 1903 (1976 ed.) (footnotes omitted). Just as proper respect for the judicial process requires litigants to give courts a fair opportunity to consider the litigants' arguments before raising them on appeal, proper respect for the legislative process requires political opponents of a redistricting plan to give the legislature a fair opportunity to consider their alternatives before seeking to overturn the legislature's plan in court. Otherwise, political opponents with little hope of legislative success would be encouraged to bypass the political process entirely. By withholding their plan they assure that the legislature cannot make use of any good features it may contain. Thereafter they seek its adoption by a federal court on the basis that the legislature's plan lacks those features. In such a situation, it is hardly the legislature that has not made a "good-faith effort," *Kirkpatrick v. Preisler*, 394 U.S. at 530-531.

Of course, a court considering whether a particular deviation from absolute equality is avoidable may consider a variety of factors. It is not limited to the mechanical task of seeing whether other plans were introduced with smaller deviations. If the deviation is large, its avoidability may be self-evident. *Wesberry v. Sanders*,

376 U.S. 1, 7 (1964) (some districts more than twice the size of others). If the deviation is smaller, it may be possible to see from maps and census data that it could easily have been avoided. *Kirkpatrick v. Preisler*, 394 U.S. at 531-532 (legislature used inaccurate data; record showed that "simple device" of switching a few counties would have markedly reduced the deviations). In some cases avoidability may not even be seriously disputed. *E.g.*, *White v. Weiser*, 412 U.S. at 790 & 790 n.9 ("State does not really dispute" avoidability; House passed two bills with smaller deviations). But a court should not conclude that a legislative plan created a greater deviations than necessary merely because someone has devised a plan, not before the legislature, with smaller deviations. Congressional districts must be "as mathematically equal as reasonably possible," *White v. Weiser*, 412 U.S. at 790, but it is not "reasonably possible" for a legislature to adjust its plan in light of another plan it has never seen.[35]

Redistricting "is primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). To allow consideration—and possibly even adoption—of alternative plans not before the legislature makes federal district courts into the primary forum for political debate and decision. This they are not. Their role, however crucial, is limited to review of legislative action in light of constitutional standards. In

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[35] In *White v. Weiser*, this Court did rely in part upon plans—"Plan B" and "Plan C"—not before the Texas Legislature in concluding that the deviations in the Legislature's plan were avoidable. 412 U.S. at 790-791. But the propriety of such consideration was not briefed, not argued, and not discussed in that case. Indeed, as the Court pointed out, "the State does not really dispute" the proposition that the deviations were avoidable, *id.* at 790. Its arguments were only that, although avoidable, they were justified by other considerations, *id.* at 791-792, and that *Kirkpatrick* should be "modified," *id.* at 792-793. *White* therefore is of little relevance in determining whether plans not before the legislature may properly be considered.

this case, since the District Court relied upon plans not before the legislature in concluding that the deviations were avoidable, and since the plans which were before the legislature were flawed, the District Court erred.

IV. EVEN IF THE DEVIATIONS IN P.L. 1982, c.1, WERE AVOIDABLE, THEY ARE JUSTIFIED BY THE LEGISLATIVE POLICY OF PRESERVING MINORITY VOTING STRENGTH.

Preservation of minority voting strength is a constitutionally permissable objective in reapportionment. *United Jewish Organizations v. Carey*, 430 U.S. 144, 161-162 (1977) (White, Stevens, Brennan and Blackmun, JJ.), 430 U.S. at 180 (Stewart and Powell, JJ., concurring).[36] The importance of preventing dilution of minority voting strength is great, and justifies small deviations from population equality. Thus, other district courts have consciously sought to protect the interests of minorities when drawing redistricting plans. *See In re Illinois Congressional District Reapportionment Cases*, No. 81 C3915 (N.D. Ill. 1981), *aff'd sub nom. Ryan v. Otto*, 50 U.S. L.W. 3546 (Jan. 11, 1982); *Carstens v. Lamm*, No. 81-F-1713 (D. Colo., Jan. 26, 1982).

The record establishes that avoiding the dilution of minority voting strength was an important consideration in the adoption of P.L. 1982, c. 1.[37] As shown in Section III above, each of the alternative plans with lower devia-

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[36] *United Jewish Organizations* involved apportionment of a state legislature. However, the conclusion that race may be considered in reapportionment plans applies to congressional reapportionment as well. Indeed, as the plurality points out, the practical necessity of complying with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c), requires that race be taken into account. Section 5 applies as well to congressional reapportionment.

[37] Karcher Deposition 125-26, 133-137, Jackman Deposition 96-99, 131-34; Feldman Deposition 12, 40-42.

tions fails to protect minority voting strength as well as it did. Even if the dilution of minority votes in the alternative plans is not so severe as to disqualify those plans as viable alternatives, still the legislature was within its constitutional prerogative in selecting the plan which best protects minorities over alternatives with slightly lower census population deviations.

The District Court did not reject the uncontradicted testimony of legislative leaders that one of the Legislature's major goals was the preservation of minority voting strength. Nor did that court find that any of the other plans would have protected minority voting strength better than P.L. 1982, c.1. It held, however, that every deviation from absolute census population equality must be shown to be lineally related to preserving minority voting strength. And it concluded that no sufficient connection had been shown on this record. As we shall demonstrate, in doing so the District Court misunderstood the legislative process, the manner in which redistricting must be carried out, and this Court's previous decisions.

Legislatures are intended to accommodate conflicting interests, not single-mindedly pursue *any* one goal, however meritorious. Little if any major legislation can be enacted without engaging in compromise. Indeed this is the genius of the democratic process, and the means by which competing groups can work out a legislative solution that is tolerable, if not ideal, for all of them. Protection of minority voting strength was, according to all concerned, a major goal for redistricting legislation. But it was not the only goal for every legislator. Much hard work, and no doubt some compromise, was necessary on the part of those most concerned with minority voting strength. *See, e.g.*, D. Ex. 2, App. 86-90. But P.L. 1982, c.1, preserves minority voting strength better than *any* of the alternatives. See pp. 28-31 above. With the trivial deviations involved in this case, that should be sufficient justification for its enactment.

A legislature engaged in redistricting is limited in flexibility by the size of the census units or building blocks from which it was assembling the congressional districts. The smallest available census unit must be placed as a whole in one or another legislative district.[38] It cannot be subdivided and split between two or more districts because no information is available to determine how many people should be allocated to each subdivision. Moreover, unless isolated "islands" are to be created, census units can be switched only between adjacent districts and only if both the units to be switched are on the boundary between the two districts. If population is to be shifted between two nonadjacent districts, it can be done only by a series of shifts involving additional districts. In this way a single change can ripple across the State like the fall of complicated rows of dominoes. Finally, if it is necessary or desirable to take factors other than population into account—for instance, to preserve minority voting strength in one or more of the districts around the State—the complications increase. In such cases racial composition of the districts to be shifted would have to be taken into account, further limiting the choice of census units to be moved. In some cases it may be impossible to make exactly the change desired.

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[38] In theory, the smallest available unit is the census block. Census blocks have an average population of about 70, although in densely populated residential districts they may be much larger. However, population information by census block is not even now available for all of New Jersey. Bureau of the Census, *1980 Census Users' Guide* 56 (1982). In fact, P.L. 1982, c.1, and all the other plans that were before the Legislature and the District Court preserved municipal boundary lines. Thus, in effect, municipalities were the smallest units from which the districts were built. There are 567 municipalities in New Jersey, *Fitzgerald's Manual of the Legislature of New Jersey*, 960 (1982), of which 406 are listed in Exhibit A to Dr. Reock's affidavit, P. Ex. 1, App. 23-24. These 406 range in census population from 9 (Tavistock Borough in Camden County) to 329,248 (Newark in Essex County). Only 20 of those municipalities had census populations under 1,000. *Id.*

Any court reviewing a plan after it has been enacted may find it difficult or impossible—and certainly will find it taxing—to reconstruct precisely how policy decisions concerning some districts (such as the decision in this case to preserve minority voting strength in the Newark district) affected the precise population of other districts. But because direct causation cannot be reconstructed does not mean that there was in fact no causal connection when the legislature acted. To retrospectively require the legislature to show precisely how preservation of minority voting strength in one district caused the population variances in other districts imposes an impossible burden on the legislature. When the deviations involved are as small as those in P.L. 1982, c.1, it should be sufficient that the plan selected better protects minorities than the available alternatives.

In holding that the legislative goal of preserving minority voting strength must be directly, causally related to every deviation from absolute census population equality, the District court effectively concluded that no other goals could every justify such a deviation. This, of course, is not the law. This Court has consistently indicated that a variety of goals may justify deviations. *E.g.*, *White v. Weiser*, 412 U.S. 783, 790-791 (1973). And of course, to say that the Legislature may have had other goals in mind in addition to preventing the dilution of minority voting power does not mean that courts should not review the plan with the protection of minority voting power in mind. See *Katzenbach v. Morgan*, 384 U.S. 641, 656-658 (1966) (statute to protect minority voting rights upheld although it did not take every conceivable step towards that end). Even if the deviations in P.L. 1982, c. 1, require special justification, the goal of preventing dilution of minority voting rights provides that justification here.[39]

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[39] The second reason the District Court rejected the appellants' argument respecting dilution of minority voting rights was that P.L. 1982, c.1, failed to include Orange, "a city with a high

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the case remanded with directions to enter judgment for appellants.

Respectfully submitted,

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concentration of minority groups" within the Tenth Congressional District. Opinion, 535 F. Supp. at 982-983, J.S. 9a. It is difficult to see how the District Court justifies second-guessing the legislature in this area. Orange itself, though its minority population was not significantly dissimilar in 1970, had been a part of the Eleventh Congressional District in the 1970 reapportionment. To infer from the Legislature's failure to move it into the Tenth District (a move that would have necessitated the removal of a like number of other people, many black) that the Legislature did not make a good-faith effort to protect minorities, was completely unjustified.

No. 81-2057

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In The

Supreme Court of the United States

October Term, 1982

ALAN J. KARCHER, Speaker, NEW JERSEY ASSEMBLY, *et al.*,

Appellants,

vs.

GEORGE T. DAGGETT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

BRIEF FOR APPELLEES EDWIN B. FORSYTHE, *ET AL.*

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QUESTIONS PRESENTED

1. Whether the District Court properly invalidated a congressional redistricting statute which created population deviations which were neither unavoidable nor justified.

2. Whether the District Court's unanimous finding of fact, in which it rejected as pretextual the Legislature's claim that the avoidable population deviations of New Jersey P.L. 1982, c. 1 were justified as the result of a policy of preserving minority voting strength, is clearly erroneous.

3. Whether, in light of the lack of any evidence to establish reliably the existence or magnitude of any undercount in the 1980 New Jersey census, the District Court properly declined to declare the avoidable and unjustified population deviations of P.L. 1982, c. 1 *de minimis* and therefore not violative of the Constitution.

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No. 81-2057

In The

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ALAN J. KARCHER, Speaker, NEW JERSEY ASSEMBLY, et al.,

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On Appeal From the United States District Court for the District of New Jersey

BRIEF FOR APPELLEES EDWIN B. FORSYTHE, ET AL.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Article I, Section 2 of the United States Constitution is set forth in appellants' brief, and New Jersey P.L. 1982, c. 1 is set forth as an appendix to the District Court's opinion (J.S. 15a-20a).

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973b and 1973c, and the Appendix to 28 C.F.R. Part 51, are lengthy. They are set forth in Appendix A hereto.

STATEMENT OF THE CASE

This appeal challenges the judgment of the three-judge United States District Court for the District of New Jersey, which invalidated a congressional redistricting statute enacted by New Jersey on the ground that it did not achieve, as nearly as practicable, the precise population equality mandated by Article I, §2 of the Constitution. *Daggett v. Kimmelman*, 535 F. Supp. 978 (D.N.J. 1982) (three-judge court) (J.S. 1a-14a).

The District Court, with one judge dissenting, found that the 0.6984% relative overall range of deviation[1] created by the New Jersey statute (P.L. 1982, c. 1) was neither unavoidable nor justified, within the meaning of *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). 535 F. Supp. at 981-983 (J.S. 6a-10a). The Court found the deviation not unavoidable because several other plans were available to the Legislature which would have created a lower relative overall range of deviation than the enacted law. 535 F. Supp. at 982 (J.S. 8a). The Court rejected as a factual matter appellants' secondary contention that the deviation was justified by the Legislature's purported goal of avoiding the dilution of minority voting strength. 535 F. Supp. at 982-983 (J.S. 9a-10a). Even the dissenting judge joined in the majority's view, as he expressed it, "that the minorities' concentration justification for the deviations which were produced must on this record be rejected as pretextual." 535 F. Supp. at 983 (J.S. 11a) (dissenting opinion of Gibbons, J.). The Court also refused to find that because of "the statistical imprecision of the census," the 0.6984% deviation was "the functional equivalent of mathematical equality." Since the censuses at issue in *Kirkpatrick* and *White v. Weiser*, 412 U.S. 783 (1973), also were imprecise, the District Court held that this Court's repudiation of similar *de minimis* arguments in those cases foreclosed appellants' census imprecision claim. 535 F. Supp. at 983 (J.S. 10a).

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1. "Relative overall range" of deviation, which is the statistic used most often in this Court's redistricting cases, is the difference between the population of the smallest district and the population of the largest district, divided by the average district population and expressed as a percent (App. 121). The District Court referred to this figure as "total deviation."

In summary, the District Court found in its March 3, 1982 opinion that the New Jersey Legislature had had the option to choose from several other available redistricting plans which would have created a lower total population deviation than the 0.6984% of P.L. 1982, c. 1. 535 F. Supp. at 982 (J.S. 8a). Because the Legislature was concerned with criteria other than the constitutional mandate of population equality in considering competing redistricting plans, the Court found, it refused to choose a plan which achieved precise population equality as nearly as practicable. *Id.* at 981 (J.S. 6a). Though the legislative leaders also claimed to have sought to "protect minority interests" in drawing district lines, both the majority and dissenting opinions found as a fact that this claimed motivation was merely pretextual and bore no relation to the deviations created by P.L. 1982, c. 1. *Id.* at 982-983 (J.S. 9a-11a).

The District Court therefore held that P.L. 1982, c. 1 violated Article I, §2 and granted a permanent injunction against the conducting of primary or general congressional elections thereunder. A judgment embodying that disposition was filed on March 8, 1982, (J.S. App. B) and on the same day the District Court unanimously denied appellants' applications for a stay pending appeal. Appellants filed a notice of appeal in the District Court on March 8, 1982 (J.S. App. C).

On March 15, 1982, Justice Brennan stayed the judgment of the District Court pending final determination of the appeal (J.S. App. D). The full Court denied motions to vacate the stay or to expedite the schedule for appeal on March 29, 1982, (J.S. App. E) and Justice Brennan denied a further motion to modify the stay on April 13, 1982 (J.S. App. F).

This Court noted probable jurisdiction of the appeal on June 21, 1982.

SUMMARY OF ARGUMENT

The District Court properly invalidated New Jersey P.L. 1982, c. 1, the congressional redistricting plan enacted by the New Jersey Legislature and Governor, on the ground that the population deviations among the fourteen congressional districts created by

the statute violated the mandate of Article I, §2 that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

Applying the first branch of the two-part test of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), to the undisputed fact that other available redistricting plans resulted in greater population equality, the District Court correctly concluded that the population deviations created by the enacted statute were not unavoidable and the statute was not the result of a good-faith legislative effort to achieve absolute equality. Moving to the second portion of the *Kirkpatrick* test, the District Court did not err in rejecting on independently-sufficient factual and legal grounds appellants' sole purported "justification" for the avoidable population deviations of P.L. 1982, c. 1. The evidence compelled the Court's unanimous finding that the Legislature's claimed concern with avoiding dilution of minority voting strength did not explain the population deviations created by the statute, and was in fact a pretext invented after the fact in an attempt to sustain the law. The real reasons for the unnecessary population deviations of P.L. 1982, c. 1 were the partisan political considerations for which the legislative leadership sacrificed the constitutional mandate of population equality.

Moreover, even if the Legislature had been actuated by its claimed solicitude for minority voting rights, it would not have been entitled to consider race in congressional redistricting in New Jersey since no part of the State is subject to §5 of the Voting Rights Act, 42 U.S.C. §1973c (1981). Satisfaction of the pre-clearance provisions of that statute is the only acceptable reason for race-conscious redistricting, which otherwise violates the Fourteenth and Fifteenth Amendment rights of non-minority voters.

Since all parties agree that there is no reliable way to determine whether or to what extent there is an undercount in the 1980 New Jersey census, the District Court properly rejected appellants' contention that the 0.6984% population deviation in P.L. 1982, c. 1 is *de minimis* and the functional equivalent of zero, and therefore does not violate the Constitution. The same argument

was before this Court in *Kirkpatrick* and in *White v. Weiser*, 412 U.S. 783 (1973), and there is no reasoned basis for this Court to accept now what it found insufficient then. The effect of such a *de minimis* rule, as the Court observed in *Kirkpatrick* and as the evidence demonstrated here, would be to encourage legislators to strive for something less than the equality required by the Constitution. In addition, the alleged undercount is assertedly the result of the census' failure to enumerate illegal aliens. Since there is no constitutional or statutory requirement that illegal aliens be included in the population base for intrastate congressional redistricting, and New Jersey did not purport to include them, any census imprecision caused by their exclusion is immaterial.

Finally, appellants' contention that the District Court gave insufficient deference to the prerogatives of the Legislature is meritless. The District Court had a duty to determine whether P.L. 1982, c. 1 violated the Constitution, and no state legislative policy can justify an unconstitutional statute. The District Court properly limited its initial judgment to the invalidation of the statute, and afforded the Legislature the opportunity to enact a constitutional substitute before any further judicial action would be taken. The evidence before the District Court established that the Legislature sacrificed the constitutional standard of population equality in favor of such non-constitutional, partisan concerns as preservation of pre-existing districts and the seniority of incumbent Democratic congressmen. When such political concerns result in a statute which violates the paramount constitutional command of population equality, they are entitled to no judicial deference and the unconstitutional law must be struck down. Only in any subsequent remedial stage of the litigation, which was not reached here, is a District Court required to promulgate a redistricting plan which leaves state reapportionment policies intact except to the extent necessary to cure the constitutional defect.

The New Jersey Legislature failed to comply with the federal constitutional command of population equality, and instead enacted a statute which responded to the partisan, political concerns of its legislative majority instead of its constitutional obligation to the electorate. The District Court therefore was obligated to invalidate P.L. 1982, c. 1 and its judgment should be affirmed.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY APPLIED *WESBERRY* v. *SANDERS*, *KIRKPATRICK* v. *PREISLER* AND *WHITE* v. *WEISER* IN INVALIDATING P.L. 1982, c. 1, SINCE OTHER PLANS WERE AVAILABLE TO THE LEGISLATURE WHICH MORE NEARLY ACHIEVED PRECISE MATHEMATICAL EQUALITY AND THERE WAS NO JUSTIFICATION FOR THEIR REJECTION.

P.L. 1982, c. 1, like any congressional redistricting statute adopted by a state legislature, must be measured against the requirement of Article I, §2 of the Constitution that "[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several States . . . ." In *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), this Court declared that the constitutional command "means that as nearly is as practicable one man's vote in a congressional election is to be worth as much as another's." Justice Black expressed the Court's condemnation of "vote-diluting discrimination," 376 U.S. at 8, as contrary to the "Great Compromise" by which the Constitutional Convention established the two Houses of Congress. 376 U.S. at 8-9; *see* 376 U.S. at 9-18.

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court "elucidate[d] the command of *Wesberry* that congressional districting meet the standard of equal representation for equal numbers of people as nearly as is practicable." *Wells v. Rockefeller*, 394 U.S. 542, 544 (1969). The Court announced a two-part test in *Kirkpatrick*:

> 1. "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality."
>
> 2. "Unless population variances among congressional districts are shown to have resulted despite such an effort, the State must justify each variance, no matter how small."

394 U.S. at 530-531. Justice Brennan summarized the rule: "Therefore, the command of Art. I, §2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. at 531.

A. The District Court was correct that the population deviations of P.L. 1982, c. 1 were not unavoidable and that the statute was not the result of a good-faith effort to achieve absolute equality.

This Court reaffirmed and reemphasized the strictness of the *Kirkpatrick* requirement of "unavoidab[ility] despite good-faith effort to achieve absolute equality" in *White v. Weiser*, 412 U.S. 783 (1973). Addressing the first part of the *Kirkpatrick* test, the Court applied *Kirkpatrick's* substantive constitutional analysis to hold that the percentage deviations in the plan enacted by the Texas Legislature, though "smaller than those invalidated in *Kirkpatrick* and *Wells*, . . . were not 'unavoidable,' and the districts were not as mathematically equal as reasonably possible." 412 U.S. at 790. In a footnote with particular relevance to the instant case, Justice White observed that the "very existence" in the Legislature of congressional reapportionment bills with lower deviations than the enacted plan "indicates that it was possible and practicable to construct a redistricting scheme with lower population deviations among districts than those embodied in [the enacted bill]." 412 U.S. at 790, n. 9.

In the present case, similarly, there were at least four redistricting plans available to the New Jersey Legislature at the time P.L. 1982, c. 1 was signed into law which would have created smaller population deviations than it does.[2] The very existence of these plans, though by no means the exclusive proof of the Legislature's lack of good faith, demonstrates as in *Weiser* "that it was possible and practicable" to formulate a redistricting plan which achieved the constitutional goal of absolute population equality more nearly than P.L. 1982, c. 1. *See, e.g., Doulin v.*

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2. *See* list at 26, *infra*.

White, 528 F. Supp. 1323, 1331 (E.D. Ark. 1982) (three-judge court). The very existence of more equipopulous plans, together with the Legislature's failure to enact one of them, conclusively negates the proposition that the Legislature made a good-faith effort to achieve precise population equality and therefore that the population deviation of the enacted law was unavoidable despite such an effort.

The District Court faithfully applied the *Kirkpatrick* test to P.L. 1982, c. 1, and found that the statute failed to clear the first hurdle:

> It is clear that the .6984% population deviation of P.L. 1982, c. 1 is not unavoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%.

535 F. Supp. at 982 (J.S. 8a). This analysis is founded squarely upon this Court's reasoning in *Kirkpatrick*, 394 U.S. at 530, and in *Weiser*, 412 U.S. at 790, n. 9. Unless those cases are to be overruled, the District Court's conclusion must be affirmed.

B. The District Court properly rejected appellants' resurrection of the "*de minimis*" theory, repeatedly discredited by this Court, in the guise of "census imprecision."

Despite the uncontradicted evidence, appellants contest the District Court's conclusion that the Legislature failed to make a good-faith effort to achieve absolute equality, and that the deviations created by P.L. 1982, c. 1 therefore were not unavoidable. They assert that the 0.6984% deviation is smaller than the "statistical imprecision of the census data," though there is nothing in the record to establish what that claimed "imprecision" is, and urge this Court to declare that "[a] reapportionment plan that contains deviation less than the statistical imprecision of the census data" is small enough to satisfy without question the "as nearly as practicable" standard [Brief for Appellants, Point II(B), at 19-22].

Missouri's similar *de minimis* argument was firmly rejected by this Court in *Kirkpatrick*, and that reasoning is equally dispositive of appellants' reassertion of the *de minimis* claim in the clothing of "census imprecision":

> The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry v. Sanders*, *supra*, at 18, the "as nearly as practicable" standard requires that the State make a good faith effort to achieve precise mathematical equality. [Citation omitted.] Unless population variances among congressional districts are shown to have resulted despite such effort, the States must justify each variance, no matter how small.

394 U.S. at 530-531.[3] Fixed, *per se* standards are particularly ill-suited to the problem of census imprecision, since appellants concede that the degree of imprecision "is not distributed equally among States, or within different areas inside any State." (Brief for Appellants at 17).

In *Weiser*, a State once again sought to convince the Court "that *Kirkpatrick* and *Wells* should be modified so as not to

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3. In reaching its conclusion, the Court declined to adopt the suggestion in Justice Fortas' concurring opinion that "[n]o purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based." 394 U.S. at 539 and n. 3.

The same proposition, which appellants resurrect here, (Brief for Appellants, Point II), was argued extensively by Texas in support of its contention in *White v. Weiser* that the *Kirkpatrick* standard "ought to be reconsidered and revised." [Brief on the Merits at 26 (*filed sub nom. Bullock v. Weiser*)].

require the 'small' population variances among congressional districts involved in this case to be justified by the State." 412 U.S. at 792. The Court nevertheless reaffirmed the validity of *Kirkpatrick's* rejection of a *de minimis* rule. Justice White observed for the Court that, compared with state legislative districts, "congressional districts . . . are relatively enormous, with each percentage point of variation representing almost 5,000 people." 412 U.S. at 793.[4] The Court thereby rejected the proposition, for which Texas had specifically and extensively argued, that the inherent imprecision of the census data renders such calculations meaningless. In so doing, it repudiated the assertion of appellants and the District Court dissent in the present case that there is a level of deviation so small as to "demonstrat[e] *as a matter of law* a good faith effort to achieve equal member districts," without reference to the uncontested fact that plans with smaller population deviations were available to the Legislature. 535 F. Supp. at 985 (J.S. 14a) (dissenting opinion of Gibbons, J.) (emphasis added).

The District Court majority properly recognized that *Kirkpatrick* and *Weiser*, when viewed in light of the census imprecision arguments advanced in Justice Fortas' *Kirkpatrick* concurrence and Texas' *Weiser* brief, foreclosed appellants' contention:

> Whatever margin of error was present in the 1980 decennial census, there were similar limitations in the 1960 and 1970 decennial censuses when *Kirkpatrick* and *White* were decided. Despite this factor, the Court could not have spoken more clearly. "We reject. . . [the] argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as

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4. In comparison to the "almost 5,000 people" in *Weiser*, each percentage point of variation in the present case represents 5,261 people. The 0.6984% maximum deviation of P.L. 1982, c. 1 thus represents 3,674 people, in a State where the last gubernatorial election was decided by 1,797 votes. *Fitzgerald's Legislative Manual, State of New Jersey* 458 (1982).

> practicable' standard." *Kirkpatrick*, 394 U.S. at 530."

535 F. Supp. at 983 (J.S. 10a).

C. The District Court properly rejected appellants' purported "justification" for the Legislature's failure to achieve absolute population equality as nearly as practicable.

Appellants claim, without citing any authority for the proposition, that "[t]he importance of preventing dilution of minority voting strength is great, and justifies small deviations from population equality" as a matter of law. (Brief for Appellants at 34). Relying solely on the self-serving testimony of Democratic legislative leaders, appellants further assert that "[t]he record establishes that avoiding the dilution of minority voting strength was an important consideration in the adoption of P.L. 1982, c. 1." (Brief for Appellants at 34 and n. 37). On this flawed legal and factual foundation they construct the equally-defective premise that the New Jersey Legislature was within some unidentified "constitutional prerogative" in "selecting the plan which best protects minorities over alternatives with slightly lower census population deviations." (Brief for Appellants at 35). This argument is wrong on the facts and wrong on the law.

1. The District Court properly found, as a matter of fact, that the Legislature's claimed solicitude for avoiding dilution of minority voting strength — the sole claimed "justification" for the adoption of P.L. 1982, c. 1 instead of a less-deviant bill — was "pretextual."

The District Court rejected appellants' "minority dilution" excuse as a matter of fact. 535 F. Supp. at 982-983 (J.S. 9a-10a). Indeed, even the dissenting judge agreed "that the minorities' concentration justification for the deviations which were produced must on this record be rejected as pretextual." 535 F. Supp. at 983 (J.S. 11a). This unanimous finding of fact must be upheld by this Court unless clearly erroneous, *City of Rome v. United States*, 446 U.S. 156, 183 (1980), and the affidavits and deposition testimony which constitute the record before the District Court fully justify that Court's rejection of the legislative leadership's

carefully-orchestrated, *post hoc* solicitude for minority voting rights.[5] The District Court's finding as trier of fact that the New

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5. When asked by the District Court at oral argument whether he had any evidence to demonstrate that the districts were drawn in order to avoid the dilution of minority strength, counsel for appellants was forced to concede that he could not "say that happened with certainty. There were many conversations and judgments which went into the passage of the present law." (App. 181; *cf.* App. 178-182). Indeed, Assembly Speaker *Pro Tem* Christopher Jackman could not even recall whether P.L. 1982, c. 1 had been defended in debate on the ground that it avoided dilution of minority power [Jackman Deposition at 86-87 (J. Ex. 21; this portion of deposition is not reproduced in the Joint Appendix, and is therefore attached hereto in Appendix B)].

Appellants' cynical manipulation of their pretextual "minority non-dilution" rationale is typified by the self-contradictory affidavit of S. Howard Woodson, Jr., submitted to the Court as Defendants' Exhibit 4 (App. 93-96). Mr. Woodson's affidavit identifies him as a former Democratic Assemblyman and New Jersey's first black Assembly Speaker (App. 93). In Paragraph 4 of his affidavit Mr. Woodson criticizes Bill A-3817, which would have created a total population deviation of only 0.4515% as compared to the enacted bill's 0.6984%, and which would have increased the black majority in the Tenth District to 56.70% over the enacted bill's 54.75%. (*See* App. 119-142.) He conspicuously fails to point out that A-3817 would have placed the 57% black City of Orange in the 56.70%-black Tenth District, while P.L. 1982, c. 1 relegates Orange to the 93%-white Eleventh District. 535 F. Supp. at 982-983 (J.S. 9a-10a). Woodson nevertheless contends that A-3817 was inferior to P.L. 1982, c. 1 because A-3817 would have divided areas of significant black population in Trenton and in Burlington County into two separate districts: "By combining municipalities with significant black population in one district, P.L. 1982, c. 1 significantly enhances the congressional influence of blacks in both counties." (App. 94).

Later in his affidavit, however, Mr. Woodson is called upon to explain why Bill A-3772, which would have combined the significant black populations of Trenton and Camden in one congressional district, was also detrimental to the interests of black voting strength. Apparently heedless of his own claim only seven paragraphs earlier that "combining municipalities with significant black population in one district . . . significantly enhances the congressional influence of blacks in both counties," Mr. Woodson now asserts:

> As a black political activist with what I believe to be many years of experience in minority representation, I am unalterably opposed to the inclusion of the cities of Camden and Trenton in the same congressional district. To do so would severely impact as a detriment to minority representation in central and southern New Jersey. . . . [The black population

(Cont'd)

Jersey Legislature was not actuated by a concern for minority voting strength is unassailable, and should not be disturbed by this Court. Since this is the sole justification upon which appellants rely, (App. 182) this Court must affirm the District Court's finding that the Legislature's failure to achieve precise mathematical equality as nearly as practicable was unjustified.

2. Even if the Legislature had been motivated by non-dilution of minority voting strength, a state legislature may not permissibly consider race in redistricting where no part of the State is subject to the pre-clearance provisions of §5 of the Voting Rights Act.

This Court established in *Kirkpatrick* that a State could not justify population variances in congressional districts on the ground that they "were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress." 394 U.S. at 533. Justice Brennan continued for the Court:

> . . . [T]o accept population variances, large or small, in order to create districts with specific

(Cont'd)

> percentages of Trenton and Camden] taken individually constitute two strong minority voices and allow for these two groups of minorities to rest their concerns on two Congressmen rather than one Congressman as provided for by A-3772. Although A-3772 joins Camden and Trenton resulting in a larger concentration of minorities (24.2% of the population) in a single district, it nevertheless, on balance works to deminish [sic] minority impact on congressional representatives on a statewide basis. (App. 94-96).

The only consistent thread in Mr. Woodson's analysis of minority strength under P.L. 1982, c. 1, as compared to A-3817 or A-3772, is that P.L. 1982, c. 1 always wins. (It should be noted that neither appellees nor the District Court relied on A-3772 as a basis for invalidating P.L. 1982, c. 1, because it was flawed in other respects.) The facile manipulation of facts and political theory in the Woodson affidavit, taken together with the other evidence of the insincerity of the minority anti-dilution claim which is discussed in the District Court's opinion, 535 F. Supp. at 982-983 (J.S. 9a-10a), demonstrates the accuracy of the District Court's unanimous perception that this rationale was only a pretext invented after the fact in an attempt to justify the Legislature's politically-motivated refusal to follow the constitutional command of precise mathematical equality as nearly as practicable.

> interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. "[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Reynolds v. Sims*, [377 U.S. 533] at 579-580. See also *Davis v. Mann* 377 U.S. 678, 692 (1964).

Id.

Appellants assert, however, that "[p]reservation of minority voting strength" is now "a constitutionally permissable [sic] objective in reapportionment," relying solely on *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (Brief for Appellants at 34).[6]

United Jewish Organizations has absolutely no applicability to this case, and except in the narrow circumstances covered there this Court has never retreated from *Kirkpatrick's* prohibition of legislative reliance on non-fragmentation of economic or social interest groups as purported justification for unnecessary population variances in congressional districts.

Part I of Justice White's opinion, the only portion in which a majority of the Court joined, notes that the Court of Appeals had "observed that the case did not present the question whether a legislature, 'starting afresh,' could draw lines on a racial basis so as to bolster nonwhite voting strength, but rather the 'narrower' question whether a State could use racial considerations in drawing lines in an effort to secure the Attorney General's approval under

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6. Appellants erroneously characterize Justices Stewart and Powell as "concurring" with the *United Jewish Organizations* plurality opinion cited in support of this assertion. In fact Justices Stewart and Powell concurred only in the judgment of the Court. That judgment was announced by Justice White, who filed the opinion cited by appellants, but only Justices White, Stevens, Brennan and Blackmun joined or concurred in the portion of that opinion which appellants cite for this proposition.

the Voting Rights Act, 510 F. 2d at 524." 430 U.S. at 154. In Part III of the plurality opinion, representing the views of four Justices, Justice White expressly declined to reach the issue for which appellants claim *United Jewish Organizations* stands:

> New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. This has been its primary defense of the plan, which was sustained on that basis by the Court of Appeals. Because the Court of Appeals was essentially correct its judgment may be affirmed without addressing the additional argument by New York and by the United States that, wholly aside from New York's obligation under the Voting Rights Act to preserve minority voting strength in Kings County, the Constitution permits it to draw district lines deliberately in such a way that the percentage of districts with a non-white majority roughly approximates the percentage of nonwhites in the county.

430 U.S. at 165. Only in Part IV of the plurality opinion, in which only two other Justices joined, was it viewed permissible absent the applicability of §5 of the Voting Rights Act for a State consciously to create districts in which a particular racial group will be in the majority. 430 U.S. at 168.

The Court's judgment in *United Jewish Organizations*, therefore, established only that "the Constitution does not prevent a State *subject to the Voting Rights Act* from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with §5" of the Act. 430 U.S. at 161 (emphasis added) (plurality opinion of White, J.). This proposition garnered the support of a majority of the Court only through the votes of Justices Stewart and Powell, who concurred in the judgment in specific reliance on the applicability of the Voting Rights Act to New York's action: "The clear purpose with which the New York Legislature acted — in response to the position of the United States Department of Justice under the Voting Rights Act — forecloses any finding that it acted with the invidious purpose of discriminating against white voters

[in violation of the Fourteenth or Fifteenth Amendments]." 430 U.S. at 180 (opinion of Stewart, J., concurring in the judgment). (Footnote omitted.)

Unlike New York, however, no part of New Jersey is subject to §5 of the Voting Rights Act, 42 U.S.C. §1973c (1981). The provisions of that section apply only to states or political subdivisions as to which the Attorney General has found the existence of a prohibited "test or device" as a prerequisite for voting or registration, and as to which the Director of the Census has found that less than 50 percent of its voting-age residents were registered to vote or voted in the last Presidential election. 42 U.S.C. §§1973b(a), 1973b(b), 1973c (1981). No such finding has been made with respect to New Jersey, or to any political subdivision of New Jersey, and §§1973b and 1973c are therefore wholly inapplicable to this case. "Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended," Appendix to *Department of Justice Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended,* 28 C.F.R. Part 51 (1981).

Appellants' contention that *United Jewish Organizations* establishes that New Jersey was entitled to consider race in formulating its congressional reapportionment plan because "the practical necessity of complying with Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, requires that race be taken into account," therefore, is simply false. (Brief for Appellants at 34, n. 36). Moreover, even if *United Jewish Organizations* did apply to New Jersey, neither it nor any other of this Court's decisions cited by appellants stands for the proposition that "[t]he importance of preventing dilution of minority voting strength . . . justifies small deviations from population equality" in congressional districts. (Brief for Appellants at 34).

First, *United Jewish Organizations* dealt only with state legislative redistricting and did not involve the strict population equality requirements imposed upon congressional reapportionment by Article I, §2, which are far more stringent then the equal protection test applicable to state legislative districting. *Mahan v. Howell,* 410 U.S. 315, 324 (1973). Second,

even the portion of the *United Jewish Organizations* plurality opinion which would have authorized race-conscious districting without reference to the applicability or requirements of the Voting Rights Act states clearly that population equality cannot be sacrificed:

> . . . [W]e think it also permissible for a State, *employing sound districting principles such as* compactness and *population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

430 U.S. at 168 (plurality opinion of White, J.) (emphasis added).[7] This portion of the plurality opinion then crystallizes its recognition of the importance of population equality by quoting *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), for the proposition that population equality is a prerequisite to the legitimacy of race-conscious districting in state legislatures. 430 U.S. at 168.

Far from providing any support for appellants' contention that the prevention of dilution of minority voting strength justifies deviations from population equality, therefore, *United Jewish Organizations* stands for a quite different proposition: that even if race-conscious redistricting were permissible in a jurisdiction not covered by the Voting Rights Act, the Legislature would nonetheless be bound to respect the applicable standard of population equality before it could permissibly favor one group of voters over another through racially-preferential redistricting.

In summary, appellants' contention that the constitutional mandate of precise mathematical equality among congressional districts, as nearly as practicable, is to be balanced against or

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7. The districts created by P.L. 1982, c. 1 are hardly compact. *See* map in Motion to Affirm at 8a.

sacrificed in order to achieve political power for a particular economic or social interest group is precisely the purported justification which this Court specifically rejected in *Kirkpatrick*.[8] *United Jewish Organizations* did nothing to change that rule in jurisdictions such as New Jersey which are not subject to §5 of the Voting Rights Act. Moreover, even those Justices who would have permitted race-conscious reapportionment of state legislative districts without regard to the applicability of the Voting Rights Act specifically conditioned its permissibility upon compliance with applicable standards of population equality.[9] Since P.L. 1982, c. 1 fails to comply with those standards, appellants' purported justification based on non-dilution of minority voting strength must fail.

II.

THE DISTRICT COURT WAS UNDER NO OBLIGATION TO DEFER TO STATE "LEGISLATIVE POLICY" IN DETERMINING WHETHER P.L. 1982, c. 1 VIOLATED THE FEDERAL CONSTITUTION.

Appellants claim that *White v. Weiser* stands for the proposition that a court must defer to "legislative policy" as a "primary factor" in assessing the constitutional sufficiency of a legislatively-enacted congressional redistricting statute such as P.L. 1982, c. 1. (Brief for Appellants, Point I). This assertion is fundamentally flawed by its confusion of the standards

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8. In addition to its insufficiency as a justification under Article I, §2, racially-motivated redistricting may violate the Fourteenth and Fifteenth Amendment rights of non-minority voters in the absence of the statutory compulsion of the Voting Rights Act. *United Jewish Organizations, supra.*

9. It should also be noted that the sole portion of New Jersey with a black population large enough to compose more than fifty percent of a congressional district is the City of Newark and surrounding communities. That district has elected appellant Peter W. Rodino, Jr. as its Congressman for the past 34 consecutive years, most recently on November 2, 1982. Appellants presumably do not contend that the consistent success of appellant Rodino's 18 consecutive campaigns has resulted from or in the dilution of black voting strength or political power in that area, thereby necessitating the extraordinary sacrifice of the paramount constitutional command of population equality.

applicable to *judicial review* of legislatively-enacted plans, which is the issue presented by this appeal, with the more circumscribed considerations appropriate to *judicial formulation* of remedial plans, which was the issue in *Weiser*.

A. No deference to state redistricting policy is required of a District Court in simply determining whether a legislatively-enacted congressional redistricting plan violates Article I, §2.

Justice White's opinion for the Court in *Weiser* is divided into two parts. Part I affirms the District Court's invalidation of Texas' legislatively-enacted congressional redistricting statute in a straightforward application of *Wesberry, Kirkpatrick* and *Wells*. 412 U.S. at 790-793. Part II, by contrast, is addressed solely to the proper scope of the District Court's remedial discretion in affirmatively promulgating a particular plan ("Plan C") instead of another available alternative ("Plan B"). Contrary to the suggestion of appellants' brief, at 11-13, it is solely with respect to Part II's analysis of the District Court's remedial authority that the issue of deference to state policies is discussed.

Appellants claim, in purported reliance on *White v. Weiser*, that "[a] legislature's choices of policies to be followed in redistricting are so tied to local preferences — and at the same time so important to citizens of the State — that this Court has already indicated that those policies are more important than miniscule differences in deviation from absolute census population equality." (Brief for Appellants at 12). Yet in Part I of the Court's opinion in *Weiser* — the sole portion of that opinion which is addressed to review of the *legislature's* choice of redistricting plans rather the District Court's — Justice White rejects this very claim in favor of continued fidelity to the strict standard of precise population equality "as nearly as practicable":

> Keeping in mind that *congressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts* and that, as compared with the latter, they are relatively enormous, with each percentage point of variation representing almost 5,000 people, we are not inclined to disturb Kirkpatrick and Wells.

412 U.S. at 793 (emphasis added).

Appellants attempt to transmute the principles of *Weiser*, as expressed most recently in *Upham v. Seamon*, ____ U.S. ____, 102 S. Ct. 1518 (1982), from limitations on a District Court's remedial power, an issue not presented here because the District Court never reached the remedial stage, into a rule which would require a District Court to balance state political policy against the constitutional mandate of population equality in assessing the constitutionality of a legislatively-enacted congressional redistricting plan in the first instance. That fight was fought and lost in *Kirkpatrick*, where the Court rejected such asserted state policy justifications as non-fragmentation of areas with distinct economic and social interests, "legislative interplay" and the exigencies of partisan politics, preservation of political subdivisions and geographical compactness. 394 U.S. at 533-536. *Accord, White v. Weiser, supra,* 412 U.S. at 791-792 and nn. 10, 12.

The language in *Weiser* and *Upham* upon which appellants rely as the basis of their "deference to legislative policy" argument, therefore, bears solely upon the District Court's prerogatives in the remedial stage of congressional redistricting litigation and has no application to its assessment of the constitutionality of a legislatively-enacted plan in the first instance:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, *whenever adherence to state policy does not detract from the requirements of the Federal Constitution*, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.

White v. Weiser, supra, 412 U.S. at 795 (emphasis added) (Brief for Appellants at 11, n. 8). Moreover, even if the cited language were applicable to the present case, P.L. 1982, c. 1 does "detract from the requirements of the Federal Constitution" as set forth in *Kirkpatrick* and *Weiser* by failing to provide the greatest

practicable degree of population equality among New Jersey's congressional districts.[10]

B. The evidence before the District Court fully supported its conclusion that the Legislature violated Article I, §2 in enacting P.L. 1982, c. 1, and the state redistricting policies underlying the statute were therefore entitled to no deference until some future remedial stage of the proceeding.

The District Court relied on compelling, corroborated testimony from the legislative leadership in concluding that the Legislature did not make the required good-faith effort to achieve precise mathematical equality, but sought instead to balance the constitutional command against partisan concerns. 535 F. Supp. at 982 (J.S. 8a-9a). Senator Matthew Feldman, the sponsor of the Senate bill (S-711) which became P.L. 1982, c. 1, testified that he had been aware that other redistricting plans were available which achieved greater population equality than S-711. For Senator Feldman, however, the constitutional command was not the only standard: ". . . But you have to take it, you just can't be a single issue individual. That's very important, the zero population. You

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10. In response to arguments similar to appellants' in another 1982 congressional redistricting case, Circuit Judge Arnold aptly summarized the limitations of judicial deference to state policies in congressional redistricting:

> The *White* opinion also states that "a district court should . . . honor state policies in the context of congressional reapportionment," *Id.* at 795, but this language occurs in Part II of the opinion, and is limited to the remedial phase of the case. State policies are relevant at this stage, when a court may have to fashion a reapportionment plan of its own or choose among plans suggested by the parties. They are not relevant (except in those rare instances, up to now unrevealed, in which a state policy may be a legal justification for population variances) to the initial decision whether the State's own plan is constitutional. State policies are to be considered in the remedial phase of a case, moreover, only when "adherence to state policy does not detract from the requirements of the Federal Constitution." *White*, 412 U.S. at 795. See also *id.* at 797. We conclude that *Kirkpatrick* retains its full vigor.

Doulin v. White, 528 F. Supp. 1323, 1331 (E.D. Ark. 1982) (three-judge court). *See* Point I(C), *supra*.

also had to take in the other considerations. It's only one, as far as I was concerned, [of] three criteria." (App. 114). He added: ". . . As I said before, there were Bills that could have been lower. . . . That's not our only standard." (App. 115).

Assemblyman (now-Speaker) Alan J. Karcher viewed population equality as merely "aspirational," and considered it to be a goal which, "because of the reality of the process, normally can't be reached." (App. 118). Referring in his testimony to other redistricting criteria listed in the sworn statement he submitted to the District Court, (App. 81) Karcher maintained that such concerns as preservation of pre-existing districts, preservation of municipal boundary lines and avoidance of dilution of minority voting rights "both supplement and modify" the paramount constitutional command of population equality. (App. 118). In his view, population equality "will remain aspirational, normally, in essence, because of these factors having to also be respected." *Id.* According to the legislative leadership, therefore, population equality could be sacrificed in order to achieve non-constitutional, partisan goals.

The chronology of the Legislature's refusal to seek maximal population equality, despite the constitutional mandate, began early in 1981. When the results of the 1980 decennial census became available, it was apparent that New Jersey would lose one seat in the House of Representatives and that the Legislature would therefore be required to enact a congressional redistricting plan. In early 1981, Dr. Ernest C. Reock, Jr.[11] began to prepare a redistricting proposal which he believed would best effectuate this Court's command that absolute population equality be achieved as nearly as practicable. (App. 4).

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11. Dr. Reock is the Director of the Bureau of Government Research at Rutgers University. The principal functions of the Bureau of Government Research are to conduct research on problems of state and local government in New Jersey, to conduct training programs for local government officals in New Jersey, and to provide technical assistance to state agencies and officers and members of the public in governmental problems. In pursuit of these activities, Dr. Reock and the Bureau of Governmental Research have been involved in problems of New Jersey congressional redistricting for more than twenty years. (App. 3-4).

Dr. Reock completed his proposal (App. 8-34) on July 31, 1981 and on August 7, 1981 sent copies to then-Governor Brendant T. Byrne and to the leadership of both houses of the Legislature, among others. He sent copies to all other legislators on August 11, 1981. (App. 4-5).

Though he sent his plan to all 120 members of the Legislature, Dr. Reock received only one substantive response: a five-page letter from Assembly Speaker Christopher J. Jackman dated August 28, 1981. (App. 5). The District Court majority found the Jackman letter so "remarkable" (535 F. Supp. at 982; J.S. 5a) that it appended the letter in full to its opinion. *Id.* at 989-993 (J.S. 23a-29a). The dissenting judge, too, characterized the Jackman letter as "harshly partisan." *Id.* at 984 (J.S. 13a).

Speaker Jackman's letter, as well as his deposition testimony, demonstrates that the Legislature's primary concern was not the achievement of population equality but rather the partisan goal of achieving for the Democratic majority the kind of unfair redistricting plan which the Democrats claimed prior Republican majorities had enacted. Speaker Jackman acknowledged in his deposition that his letter's discussion of the need to prevent possible national Republican control of the House of Representatives constituted "some of the considerations" he weighed in determining how to draw a redistricting plan for New Jersey (App. 116-117). Elsewhere in his letter to Dr. Reock, Speaker Jackman was even more specific:

> Here in New Jersey the Democratic Party has control over the Congressional apportionment process for the first time ever. This occurs, as you know, because Democrats hold a majority in both houses of the legislature, as well as being represented in the Governor's seat. Ten years ago, and during every Congressional redistricting in New Jersey's history, Republicans played the predominant role. Each time Republicans sought to legislate districts which would maximize their representation in Congress. And each time Republicans drew districts which were intended to

> improve upon the previous partisan Congressional representation.
>
> * * *
>
> . . . Given the process by which the Legislature decides upon a plan how can you expect members of the Legislature to ignore election data which would perhaps lead to other Congressional district configurations more beneficial to party members? You in essence are asking Democrats to subjugate their interests and in effect ignore political election results in order to accommodate your 'ideal' apportionment plan.

535 F. Supp. at 990-991 (J.S. 25a-27a). Based on this evidence,[12] the District Court found that the Legislature viewed the constitutional requirement of population equality as merely one of a number of redistricting considerations to be balanced against each other, and that the Reock plan was rejected "because it did not reflect the leadership's partisan concerns." *Id.* at 982 (J.S. 8a-9a).

Moreover, despite this Court's repeated rejection of the proposition "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard," *Kirkpatrick v. Preisler*, *supra*, 394 U.S. at 530; *White v. Weiser*, 412 U.S. 783, 790 n. 8 (1973), Assemblyman Karcher aimed only for a deviation "benchmark" of "under one percent." [Karcher Deposition at 55-56, 58 (not reproduced in Joint Appendix but attached in Appendix B)]. He thereby proved the

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12. *See also* Affidavit of Assemblyman Richard Zimmer (App. 62-63) (Assembly sponsor of P.L. 1982, c.1 stated in substance during Assembly debate "that you can't have perfect equality and that therefore it is necessary to balance population equality against other criteria"; Speaker Jackman stated during Assembly debate "that when the Republicans had a majority they had drawn the redistricting maps the way they wanted them drawn, and that now the Democrats were just doing the same thing that the Republicans had done").

wisdom of Justice Brennan's observation in *Kirkpatrick* that acceptance of the *de minimis* approach "would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 U.S. at 531.

Finally, the evidence before the District Court provided ample support for the Court's unanimous conclusion that the "minority dilution" rationale — appellants' sole claimed "justification" for the avoidable population deviation created by P.L. 1982, c. 1 — was only a pretext created after the fact in a vain effort to salvage the statute. Despite the fact that he continually raised a so-called "racial problem" in his testimony as a consideration involved in redistricting, for example, Speaker Jackman could not recall whether anyone defended the enacted bill during debate on that ground. [Deposition of Jackman at 87 (not reproduced in Joint Appendix but attached in Appendix B)]. There was, in fact, absolutely no contemporaneous evidence before the Court to suggest that the so-called "minority dilution" issue was ever mentioned or considered by the Legislature in enacting P.L. 1982, c. 1. Only the self-serving, post-litigation affidavits of the Democratic legislative leaders give this supposed concern dutiful, rote recitation.

There were at least four redistricting plans available to the New Jersey Legislature[13] which resulted in smaller population

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13. Appellants construct an elaborate argument on the fact that A-614 and A-615, though proposed for introduction one day before P.L. 1982, c.1 was enacted, were not given first reading in the Assembly until February 1, 1982. (Brief for Appellants at 30, n.33). They contend that the District Court erred in considering as "available to the Legislature" plans which had not been formally introduced in bill form at the time P.L. 1982, c.1 was enacted. *Id.* at 30-34.

The constitutional test is not whether less-deviant *bills* were formally *before* the Legislature, but rather whether the deviations in the enacted plan were "unavoidable" because no more equipopulous *plan* was *available* to the Legislature. It is undisputed that the Reock plan, which created a smaller population deviation than P.L. 1982, c.1, was available and had been brought to the attention of each legislator as early as August 1981. It is also undisputed that A-3547 and A-3817 were both introduced in the Legislature before S-711, the bill which became P.L. 1982, c.1, and that both A-3547 and A-3817 had smaller population deviations than the enacted bill. None of these plans, therefore, supports appellants' assertion that the District Court "blindsided [the Legislature] by alternatives that it had no chance to consider." (Brief for Appellants at 31).

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deviations than P.L. 1982, c. 1 and also, if the issue is even material, protected minority voting power in the only area of the State with a large enough minority population to constitute a congressional district majority — the Tenth (Newark) District. The District Court relied upon the following four plans in support of its conclusion "that the .6984% population deviation of P.L. 1982, c. 1 is not unavoidable" (535 F. Supp. at 982; J.S. 8a):

Bill No.	Sponsor	Date Proposed	Deviation	% Black 10th Dist.
P.L. 1982, c.1 (S-711)	Feldman	1/12/82	.6984%	54.75
A-3547	DiFrancesco	1/4/82	.1252%	52.80
A-3817	Hardwick	1/11/82	.4515%	56.70
A-614	Bennett	1/18/82	.1369%	53.21
A-615	Kavanaugh	1/18/82	.0293%	53.45

As the District Court observed, the City of Orange is 57.30% black. A-3817 places Orange in the 56.70%-black Tenth District, while P.L. 1982, c.1 places Orange in the 93%-white Eleventh District.

Appellants' discussion of the available alternative redistricting plans confirms that they consider population equality as merely

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(Cont'd)

A-614 and A-615 stand as eloquent testimony of what the Legislature could have achieved had it complied with the constitutional command to make a good-faith effort to attain population equality. If Assemblymen Bennett and Kavanaugh could formulate and propose, at the same time that the Legislature was considering P.L. 1982, c.1, redistricting plans which achieved respectively more than five times and more than 23 times greater population equality than P.L. 1982, c.1, this Court can hardly find that the deviation of the enacted statute was objectively unavoidable or the result of a good-faith legislative effort to achieve precise mathematical equality.

one criterion among many, and that they cannot contest the fact that other available plans would have achieved better population equality than the enacted law.[14] Accordingly, whatever *non-constitutional* state policies underlay P.L. 1982, c.1 were not entitled to any deference once it was determined that the resulting statute violated the paramount constitutional command of population equality.

C. The District Court showed due respect for the prerogatives of the Legislature in limiting its action to the invalidation of the legislative plan, and affording the Legislature the first opportunity to enact a constitutional replacement.

At the very end of their argument for "deference to state policy," appellants are forced to admit that the deference language of *Weiser* and *Upham* is limited to the remedial context.[15] (Brief

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14. Their only criticism of A-3547, which achieved a population deviation more than five times smaller than that of the enacted bill, is that it reduced the black percentage of the Tenth District from 54.75% to 52.80%. They contend that this difference "would have further decreased the likelihood of black control of the district." (Brief for Appellants at 29). This rationale goes the *de minimis* argument one better; instead of contending that *de minimis* population deviations are justified by substantial increases in minority strength, appellants appear to claim here that miniscule improvements in minority population percentages justify a five-fold decrease in population equality.

Appellants' search for a defect in A-3817 is even more demanding, since that bill would have created a greater concentration of black voters in the Tenth District than P.L. 1982, c.1 while reducing the enacted bill's population deviation by more than 35%. Again relying on their claimed balancing test, they are reduced to the assertion that A-3817 "diluted the minority vote in the next largest black district" (the Fourth District, which includes Trenton) from 17.3% to 11.9%. *Id.* Appellants apparently would have this Court hold that constitutionally-mandated population equality may be sacrificed in favor of meaningless increases in minority concentration which do not even approach the level required to "control" the district.

15. Like *Weiser*, and unlike this case, *Upham* reviewed a District Court order promulgating a congressional redistricting plan rather than merely invalidating a legislatively-enacted plan. What is most significant about *Upham* is that the District Court there redrew the congressional districts for Dallas County, Texas without making any finding that those districts were constitutionally or statutorily defective. 102 S. Ct. at 1520. According to its memorandum opinion summarily

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for Appellants at 14). They claim, nevertheless, that those cases should be applied *a fortiori* "to the initial question whether a legislative plan is constitutional, since this Court has repeatedly stated that Legislatures have a wider latitude in the formulation of redistricting plans than courts." *Id.* What appellants ignore, however, is the reason why judicial latitude in *formulating* redistricting plans is more limited than the scope of its *review* of legislatively-enacted plans in the first instance.

In the present case, the District Court simply invalidated P.L. 1982, c.1 on the ground that it violated the mandate of Article

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(Cont'd)
reversing the District Court's order, this Court "agree[d]" with the *Upham* appellants "that in the absence of any objection to the Dallas districts by the Attorney General, and in absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgment the plans reflect. . . ." *Id.* at 1520-1521. This Court relied specifically on *Weiser* in terms which confirm the limitation of Part II of the *Weiser* opinion to the remedial context:

> We held there that the District Court erred when, *in choosing between two possible court-ordered plans,* it failed to choose that plan which most closely approximated the state proposed plan. The only limits on judicial deference to state apportionment policy, we held, were the substantive constitutional and statutory standards to which such state plans are subject. [412 U.S.] at 797.

Id. at 1521 (emphasis added).

Upham thus imposes two limitations upon any judicial deference to state apportionment policy, each of which is sufficient to exclude the deference issue from this case:

> 1. Deference to state policy is required only in the remedial context, which the New Jersey District Court never reached; and
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> 2. Deference to state policy is not required, even in the remedial context, when the legislatively-enacted congressional redistricting statute embodying such state policy violates the federal constitutional mandate of "precise mathematical equality as nearly as practicable," as demonstrated here by the availability to the New Jersey Legislature of numerous alternative plans with lesser population deviations than P.L. 1982, c.1.

I, §2, as elucidated in *Wesberry, Kirkpatrick* and *Weiser*. 535 F. Supp. at 983 (J.S. 10a). It did not formulate its own plan, properly preferring to permit the Legislature to enact a new statute which would conform to the requirements of the Constitution. The District Court specifically granted the Legislature more than three weeks to do so before the Court would reconvene to undertake further proceedings in the absence of an intervening constitutional statute. *Id.* It therefore followed to the letter the principles of federal judicial restraint enunciated by Justice White in *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), upon which appellants rely here:

> When a federal court declares an existing apportionment scheme unconstitutional, it is therefore appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. "[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." [*Burns v. Richardson*, 384 U.S. 73] at 85 (1966).

See Brief for Appellants at 14. The District Court thus took care not to restrict, beyond what was necessary to vindicate the clear command of Article I, §2, New Jersey's freedom of choice to devise a constitutional redistricting statute.

The reason why judicial latitude is circumscribed in formulating redistricting plans is that such a judicial plan becomes "the governing law" unless the Legislature passes a superseding constitutional statute. By contrast, when a District Court merely declares a legislatively-enacted plan unconstitutional it has created no "governing law" at all. Provided that the District Court affords the Legislature a reasonable opportunity to act after it invalidates

a statute and before it undertakes the "unwelcome obligation" of judicial legislation, *Connor v. Finch*, 431 U.S. 407, 415 (1977), it has satisfactorily recognized the prerogatives of the Legislature upon which appellants rely here. The New Jersey District Court did precisely that.

Though legislatures may have "a wider latitude in the formulation of redistricting plans than courts" do in the formulation of redistricting plans (Brief for Appellants at 14), neither legislatures nor courts may formulate redistricting plans which "detract from the requirements of the Federal Constitution." *White v. Weiser, supra*, 412 U.S. at 795. A statute which violates the Constitution is entitled to no deference. The only "deference" required by *Weiser, Wise* and *Upham* is that the District Court make every effort to permit the Legislature to devise the eventual constitutional substitute for the unconstitutional statute, rather than the Court itself, and that if the Legislature fails to act the Court choose the available plan which cures the constitutional defect with the least possible violence to state policy. The New Jersey District Court fully respected that injunction by choosing no replacement plan at all, pending further legislative action.

Appellants' remaining arguments for "deference to state policy," (Brief at 14), simply make no logical sense:

> Were *White* and *Upham* to be limited to remedies, a court might be placed in the incongruous position of ordering implementation of a plan that it would have had to condemn if enacted by the legislature.

Id. This assertion is backwards. Because *Weiser* and *Upham* are limited to remedies, and give a District Court *less* remedial flexibility than a legislature, a District Court can never properly order implementation of a plan which it would have had to condemn if enacted by the Legislature. A legislative plan would require judicial condemnation only if it violated the Constitution, and no court could ever properly order implementation of a redistricting plan which violated the Constitution.

Appellants then claim that "if the constitutional standard were so strict as to leave no room for the interplay of legislative forces, then a legislature's plan could contain no state policies worth deference from the district courts." *Id.* This contention was specifically rejected in *Kirkpatrick:*

> We also reject Missouri's argument that "[t]he reasonableness of the population differences in the congressional districts under review must . . . be viewed in the context of *legislative interplay*. . . . It must be remembered . . . that practical political problems are inherent in the enactment of congressional reapportionment legislation." We agree with the District Court that "the rule is one of 'practicability' rather than political 'practicality.' " 279 F. Supp. at 989. *Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster."*

394 U.S. at 533 (emphasis added; footnote omitted). Appellants have unwittingly recognized the fundamental element of the *Wesberry-Kirkpatrick-Wells-Weiser* doctrine: there are *no* state policies which can justify the failure of a congressional redistricting plan to comply with the constitutional command that it achieve precise population equality as nearly as practicable.[16]

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16. Appellants' assertion that the District Court's application of *Kirkpatrick* to invalidate P.L. 1982, c.1 "endangers" redistricting plans adopted by other States under the 1980 census (Brief for Appellant at 22), misconceives this Court's cases. It has been clear since *Kirkpatrick* that "[t]he extent to which equality may practicably be achieved may differ from State to State . . . ." 394 U.S. at 530. That is precisely why this Court has consistently declined to establish any "fixed numerical standards" to serve as a nationwide *de minimis* rule. *Id.* Whether a statute is constitutional depends on what alternatives were available to the Legislature under "the circumstances of each particular case," *id.*, and only analysis of the facts in a particular State can resolve the constitutional issue there. Since a deviation of 0.6984% in another State might represent the greatest population equality practicable there, though it fails that test in New Jersey, the District Court's opinion "endangers" nothing but the unconstitutional P.L. 1982, c.1.

Finally, neither *Weiser* nor *Upham* "stand[s] for the proposition that adherence to legislative political choices is preferable to obtaining a minute reduction in census population deviation." (Brief for Appellants at 14). That issue was not presented by *Weiser*, since the plan chosen by the District Court there achieved *lesser* population equality than the alternative plan which this Court held should have been chosen. 412 U.S. at 796. *Upham* did not involve issues of population equality at all, but rather questions of invidious racial discrimination in a state subject to Voting Rights Act preclearance. 102 S. Ct. at 1519. Moreover, since the District Court found no statutory or constitutional violations in the Texas Legislature's redistricting of the county which the District Court nevertheless redistricted on its own, this Court ruled that the District Court had no right to impose any judicial plan in the absence of a statutory or constitutional defect in the Legislature's plan. *Id.* at 1520-1521. *Upham* therefore has nothing whatsoever to do with the question whether "adherence to legislative political choices is preferable to obtaining a minute reduction in census population of deviation." (Brief for Appellants at 14).

Stripped of its loose citation of precedent, appellants' argument may be stated simply: *Wesberry*, *Kirkpatrick*, *Wells* and *Weiser* should be limited or overruled to declare *de minimis* the New Jersey Legislature's adoption of a redistricting plan which did not achieve the greatest practicable population equality. This claim was raised and rejected in *Weiser*, 412 U.S. at 792-793, and the considerations which motivated the Court's decision there are equally or more applicable here. Each percentage point of variation here represents even more people than it did in *Weiser*, *see* n. 4, *supra* at 10, and though the total deviations are smaller than in *Weiser* each district is still "relatively enormous" and is not "so intertwined and freighted with strictly local interests as are state legislative districts." 412 U.S. at 793. The unnecessary population variances of P.L. 1982, c. 1 therefore "*do* import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation" in violation of Article I, §2. 412 U.S. at 792-793 (emphasis in original).

III.

THE DISTRICT COURT PROPERLY DECLINED, ON THIS RECORD, TO CONSIDER THE "CENSUS IMPRECISION" ISSUE.

A. The record is devoid of any evidence to establish reliably that there was an undercount in the 1980 census in New Jersey, the size of any such undercount or its distribution within the State.

Appellants assert that the 0.6984% deviation in this case "is within the statistical imprecision of the census data, and therefore is the functional equivalent of zero." (Brief for Appellants at 15). Instead of proving that proposition, the record upon which appellants rely establishes only that no one knows what the statistical imprecision of the 1980 census data is, nationally or in New Jersey, and that there is no available way to correct for or even to quantify any such disparity at any geographic level.

The dissenting judge in the District Court noted that "[i]t has been estimated" that the undercount in the 1970 census "may have been as much as 2.5% nationally and 2.6% in New Jersey," based on Census Bureau reports. 535 F. Supp. at 984 (J.S. 12a). As of March 1982, the Census Bureau had revised its estimate of the 1970 national undercount from 2.5% to 2.3%, and reported that it had "succeeded in reducing the undercount" in the 1980 census "substantially below previous levels." Bureau of the Census, *1980 Census Users' Guide* 100-101 (March 1982). The Census Bureau has nevertheless been unable to place a reliable figure on any 1980 undercount and has declined to adjust its results to attempt to compensate, principally because "the actual census count was virtually the same as the preferred estimate of the 'true' population derived from demographic analysis,[17] and no reliable estimate of the number of illegal residents was available." *Id.* at 101.[18]

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17. The actual census count was only 0.4% less than the preferred demographic estimate of "true" population. *Carey v. Klutznick*, 508 F. Supp. 420, 427 (S.D.N.Y. 1980).

18. *See* 45 Fed. Reg. 82874 (1980), *quoted in Young v. Klutznick*, 652 F. 2d 617, 621-622 (6th Cir. 1981), *cert. denied sub nom. Young v. Baldrige*, ___ U.S. ___, 102 S. Ct. 1430 (1982).

For appellants' expert James Trussell, by contrast, the lack of sufficient factual basis to support any reliable undercount estimate apparently posed little problem:

> [T]he undercount in the 1980 Census is likely to be above one percent, once an estimate of the number of illegal aliens is explicitly included in the demographic equation.

App. 103. Even Trussell admitted, however, that "[t]he undercount for New Jersey in the 1980 Census is unknown, and no reliable methodology exists for estimating it." *Id.* Nevertheless, Trussell's ability to "estimate" that for which there was no reliable evidence appeared once again unhindered by the data-free environment. Immediately after conceding that the New Jersey undercount was unknown and that there was no reliable methodology for estimating it, he estimated it anyway:

> I see no reason to believe, however, that it is below the national average.

Id. The "national average" it must be remembered, is the "likely to be above one percent" estimate which Trussell based upon the inclusion of "an estimate of the number of illegal aliens" — despite the uncontested fact that no reliable estimate of the number of illegal aliens was available.

Finally, though he apparently believed that the "national average" undercount would be spread equally over all the States, so that New Jersey's undercount would not be below that "national average," for some unstated reason Trussell nevertheless "saw no reason to believe" that New Jersey's undercount "would be uniformly spread over all municipalities." (App. 104). Accordingly, he conceded that the undercount in any congressional district is unknowable. *Id.*

The result of this series of baseless, speculative "estimates," each relying on the one before in an exponential progression of unreliability, is the conclusion upon which appellants base their entire "census imprecision" argument:

> Where, as here, the deviation from ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero.

(Brief for Appellants at 18). But as appellants argued to this Court in reply to appellees' motion to affirm, "[t]he whole point of Dr. Trussell's testimony is that we do not, and with presently available methods can not, know the exact size of the New Jersey undercount." (Appellants' Reply Memorandum at 3, n. 1). Appellants cannot credibly claim that "the *known* imprecision of the census figures" is greater than 0.6984%, when they have repeatly conceded that the degree of imprecision in the 1980 census is in fact *unknown, unknowable* and impossible to estimate reliably.

There is therefore nothing in the record to support the assertion of the dissenting judge in the District Court, echoed by appellants here, that "[a] deviation in population between the largest and smallest district of 0.6984% is smaller than the recognized margin of undercounting in the census." 535 F. Supp. at 985 (J.S. 14a). There is no "recognized margin of undercounting" for the 1980 census in this record or anywhere else.

B. Even if appellants' contentions concerning an alleged undercount in the 1980 New Jersey census — which are based on an asserted undercount of illegal aliens — were demonstrable from the evidence, there is no constitutional or statutory requirement that a State include illegal aliens in the population base used for intrastate congressional redistricting, and New Jersey did not purport to include them.

Appellants maintain that the alleged New Jersey undercount, regardless of their inability to establish its size, results from the failure to count illegal aliens. (J.S. 8; App. 98-104). The dissenting judge in the District Court based his reinterpretation of *Kirkpatrick* on the theory that the only population variances which must be justified are those "which do not achieve statistically significant dilutions of the relative representation of *voters* in larger districts when compared with that of *voters* in smaller districts." 535 F. Supp at 984 (J.S. 13a) (emphasis added). The question therefore arises whether the difficulty in enumerating illegal aliens has any bearing on the relative representation of voters.

Even if "the census is intended to include all residents" of the United States, "regardless of legal status," *1980 Census User's Guide*, *supra*, at 100, that is not necessarily the goal of intrastate congressional redistricting. The census has come to "fulfil[l] many important and valuable functions for the benefit of the country as a whole," but its original purpose was to provide a basis for interstate apportionment of seats in Congress. *Baldrige v. Shapiro*, ____ U.S. ____, 102 S. Ct. 1103, 1108-1109 (1982). Whether or not the Constitution requires the counting of aliens for purposes of *interstate* apportionment of seats in the House of Representatives, *see, e.g., Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-577 (D.D.C.) (three-judge court), *appeal dism'd*, 447 U.S. 916 (1980), the dominant concern of this Court's jurisprudence in the *intrastate* redistricting context has been to prevent the dilution of citizens' rights to cast undiluted votes. *Wesberry v. Sanders*, *supra*, 376 U.S. at 6-18. Aliens, legal or illegal, have no constitutional right to vote. *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976). Since *Wesberry* held that Article I, §2 requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," 376 U.S. at 8, the inclusion of aliens in the population base used for intrastate congressional redistricting might well violate the rights of voters in areas with relatively few alien residents. A single Congressman might then represent several times as many voters in a district with few alien residents as would his colleague from a neighboring district with many aliens. *See, e.g.*, 376 U.S. at 7. As Justice Black observed for the Court in *Wesberry*: "If the Federal Constitution intends that when *qualified voters* elect members of Congress each vote be given as much weight as any other vote, then [such a] statute cannot stand." *Id.* (emphasis added). *See* 376 U.S. at 14 ("The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.")

There is no constitutional or statutory requirement that New Jersey include aliens in the population base for purposes of intrastate congressional redistricting, and the record is barren of any suggestion that it purported to do so in enacting P.L. 1982 c. 1. Moreover, appellees agree with appellants that the New Jersey Legislature was not required to use federal census figures as the

basis for its intrastate congressional redistricting.[19] Any claimed imprecision in the population figures used by the Legislature, to the extent that it arises from the failure to count illegal aliens, is therefore immaterial to this case. There is no reason to doubt the accuracy of the 0.6984% deviation figure for P.L. 1982, c. 1 based on census imprecision, when the asserted reason for the claimed imprecision is the failure to count illegal aliens and there is no requirement that illegal aliens be counted for purposes of intrastate congressional redistricting.

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19. Brief for Appellants at 20-21; *see, e.g., Young v. Klutznick*, 652 F. 2d 617, 624-625 (6th Cir. 1981), *cert. denied sub nom. Young v. Baldrige*, ___ U.S. ___, 102 S. Ct. 1430 (1982). Although the New Jersey Constitution mandates the use of federal census figures for state legislative redistricting, it is silent with regard to congressional redistricting. N.J. Const. art. 4, §2, ¶¶1, 3.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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APPENDIX A

42 U.S.C. §1973b provides:

§1973b. Suspension of use of tests or devices in determining eligibility to vote

Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color, through the use of such tests or devices

have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon

motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state[1] which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less

than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 percentum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply to any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1,1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Appendix A

Definition of test or device

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand,or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

Completion of requisite grade level of education in American-flag schools in which predominant classroom language was other than English

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons

on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or terrority, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

Congressional findings of voting discrimination against language minorities, prohibition of English-only elections; other remedial measures

(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating

in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions,

assistance, or other materials or information relating to the electoral process,including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. §1973c provides:

§1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon

determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*: That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be

made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

The Appendix to 28 C.F.R. Part 51 provides:

PART 51—PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

* * *

APPENDIX—JURISDICTIONS COVERED UNDER SECTION 4(b) OF THE VOTING RIGHTS ACT, AS AMENDED

The preclearance requirement of Section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The date in parentheses is the date that was used to determine coverage for the jurisdiction it follows.

Alabama (statewide) (Nov. 1, 1964)
Alaska (statewide) (Nov. 1, 1972)
Arizona (statewide) (Nov. 1, 1972)

(The following Arizona counties were covered individually through the use of earlier dates.)

Apache County (Nov. 1, 1968)
Cochise County (Nov. 1, 1968)

Appendix A

Coconino County (Nov. 1, 1968)
Mohave County (Nov. 1, 1968)
Navajo County (Nov. 1, 1968)
Pima County (Nov. 1, 1968)
Pinal County (Nov. 1, 1968)
Santa Cruz County (Nov. 1, 1968)
Yuma County (Nov. 1, 1964)

California (the following counties only)
Kings County (Nov. 1, 1972)
Merced County (Nov. 1, 1972)
Monterey County (Nov. 1, 1968)
Yuba County (Nov. 1, 1968)

Colorado (the following county only)
El Paso (Nov. 1, 1972)

Connecticut (the following towns only)
Groton Town (Nov. 1, 1968)
Mansfield Town (Nov. 1, 1968)
Southbury Town (Nov. 1, 1968)

Florida (the following counties only)
Collier County (Nov. 1, 1972)
Hardee County (Nov. 1, 1972)
Hendry County (Nov. 1, 1972)
Hillsborough County (Nov. 1, 1972)
Monroe County (Nov. 1, 1972)

Georgia (statewide) (Nov. 1, 1964)

Hawaii (the following county only)
Honolulu County (Nov. 1, 1964)

Idaho (the following county only)
Elmore County (Nov. 1, 1968)

Louisiana (statewide) (Nov. 1, 1964)

Massachusetts (the following towns only)
Amherst Town (Nov. 1, 1968)
Ayer Town (Nov. 1, 1968)
Belchertown (Nov. 1, 1968)
Bourne Town (Nov. 1, 1968)
Harvard Town (Nov. 1, 1968)
Sandwich Town (Nov. 1, 1968)
Shirley Town (Nov. 1, 1968)
Sunderland Town (Nov. 1, 1968)

Appendix A

Wrentham Town (Nov. 1, 1968)
Michigan (the following townships only)
Buena Vista Township (Saginaw County) (Nov. 1, 1972)
Clyde Township (Allegan County) (Nov. 1, 1972)
Mississippi (statewide) (Nov. 1, 1964)
New Hampshire (the following political subdivisions only)
Antrim Town (Nov. 1, 1968)
Benton Town (Nov. 1, 1968)
Boscawen Town (Nov. 1, 1968)
Millsfield Township (Nov. 1, 1968)
Newington Town (Nov. 1, 1968)
Pinkhams Grant (Nov. 1, 1968)
Rindge Town (Nov. 1, 1968)
Stewartstown (Nov. 1, 1968)
Stratford Town (Nov. 1, 1968)
Unity Town (Nov. 1, 1968)
New York (the following counties only)
Bronx County (Nov. 1, 1968)
Kings County (Nov. 1, 1968)
New York County (Nov. 1, 1968)
North Carolina (the following counties only)
Anson County (Nov. 1, 1964)
Beaufort County (Nov. 1, 1964)
Bertie County (Nov. 1, 1964)
Bladen County (Nov. 1, 1964)
Camden County (Nov. 1, 1964)
Caswell County (Nov. 1, 1964)
Chowan County (Nov. 1, 1964)
Cleveland County (Nov. 1, 1964)
Craven County (Nov. 1, 1964)
Cumberland County (Nov. 1, 1964)
Edgecombe County (Nov. 1, 1964)
Franklin County (Nov. 1, 1964)
Gaston County (Nov. 1, 1964)
Gates County (Nov. 1, 1964)
Granville County (Nov. 1, 1964)

Appendix A

Greene County (Nov. 1, 1964)
Guilford County (Nov. 1, 1964)
Halifax County (Nov. 1, 1964)
Harnett County (Nov. 1, 1964)
Hertford County (Nov. 1, 1964)
Hoke County (Nov. 1, 1964)
Jackson County (Nov. 1, 1972)
Lee County (Nov. 1, 1964)
Lenoir County (Nov. 1, 1964)
Martin County (Nov. 1, 1964)
Nash County (Nov. 1, 1964)
Northampton County (Nov. 1, 1964)
Onslow County (Nov. 1, 1964)
Pasquotank County (Nov. 1, 1964)
Perquimans County (Nov. 1, 1964)
Person County (Nov. 1, 1964)
Pitt County (Nov. 1, 1964)
Robeson County (Nov. 1, 1964)
Rockingham County (Nov. 1, 1964)
Scotland County (Nov. 1, 1964)
Union County (Nov. 1, 1964)
Vance County (Nov. 1, 1964)
Washington County (Nov. 1, 1964)
Wayne County (Nov. 1, 1964)
Wilson County (Nov. 1, 1964)

South Carolina (statewide) (Nov. 1, 1964)
South Dakota (the following counties only)
Shannon County (Nov. 1, 1972)
Todd County (Nov. 1, 1972)
Texas (statewide) (Nov. 1, 1972)
Virginia (statewide) (Nov. 1, 1964)
Wyoming (the following county only)
Campbell County (Nov. 1, 1968)

[46 FR 872. Jan. 5, 1981; Order No. 921a-80, 46 FR 9571, Jan. 29, 1981]

APPENDIX B — EXCERPTS FROM DEPOSITIONS

Deposition of Christopher J. Jackman

* * *

DIRECT EXAMINATION BY MR. GOLDSTEIN:

* * *

[86] Q. Well, while you were present, do you recall if anyone ever defended the plan as to population deviations? A. I don't recollect.

[87] Q. Or if anyone ever defended the plan as to the racial problem that you raised with us earlier in the deposition today? A. I don't recall.

* * *

Deposition of Alan J. Karcher

* * *

DIRECT EXAMINATION BY MR. GOLDSTEIN:

* * *

[55] Q. But in July or August of 1981 you were, at least, aware of Dr. Reock's plan that provided for an absolute deviation of 1710 people and an absolute relative deviation of .325 percent?

MR. WALSH: An absolute percentage deviation I think is the word.

MR. GOLDSTEIN: I'll accept that.

A. I was aware of that, yes.

Q. You were aware of that as— A. I was aware that Dr. Reock had sent this plan in.

Q. And you were aware of its deviation? A. I was aware that it had a deviation — I won't say I had an awareness that it was .325. I had an awareness that it met some benchmark of being under one percent.

[56] Q. One percent as a benchmark? A. In my mind generally, yes. I — anything that was over one percent I would dismiss out of hand.

Q. And under one percent? A. Under one percent I think you were in the ballpark. At least it was worth discussing.

What I am saying is you have to draw certain dichotomies or lines in your mind as to what you're going to, as I said before, whether you're going to tilt with windmills or waste your time wasting energy.

If you're going to be shown a map that had an overall deviation, mean deviation of one percent, it wasn't worth looking at, in my mind. Wasn't worth discussing. Let's cut it off there. It's tilting, you know, an exercise in futility, tilting at windmills.

* * *

[58] Q. Now, when you use one percent as a benchmark, how did you come to one percent?

MR. WALSH: Objection, form. He didn't say he used it as a benchmark. He described it in his answer. I object to the form. Improper question, mischaracterizes the testimony.

Appendix B

Q. Mr. Karcher, what is your testimony as to — A. My testimony is anything over one percent, it's a benchmark only in terms of the fact that I, as a leader, or as a — playing a certain function within the party, would not allow my delegation to waste its time looking at any map or I wouldn't allow a member who came to me to try to proselytize his plan, to come in with something over one percent.

I would say to him, look, don't bother to even introduce this. Don't bother to pursue it if you don't have something lower than one percent. You're spinning your wheels, you're spinning your wheels, don't spin mine.

* * *

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No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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---

REPLY BRIEF FOR APPELLANTS

I.

The central question in this case is whether, as this Court has repeatedly stated, state legislatures have a substantial part to play in the congressional redistricting process, or whether, as appellees would have it, the legislature's role is merely to enact whatever plan before it has the smallest census population deviation.

Appellees argue that

> "[t]he *very existence* of more equipopulous plans, together with the Legislature's failure to enact one of them, *conclusively negates* the proposition that the Legislature made a good-faith effort to achieve precise population equality . . . ."

Appellees' Br., 8 (emphasis supplied). But if the "very existence" of unadopted plans with smaller population deviations "conclusively negates" legislative good faith in congressional redistricting, then nearly twenty years' law has been jettisoned. From *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), through *Upham v. Seamon*, 456 U.S. ——, ——, 102 S. Ct. 1518, 1521 (1982), this Court has consistently reiterated the primacy of legislative policy in the reapportionment process. Appellees would excise that law from the books, and relegate the legislatures of the fifty states to a purely mechanical role in congressional redistricting.

Appellees reach this odd result despite their apparent agreement that under *White v. Weiser*, 412 U.S. 783 (1973) a court must defer to legislative policies in ordering a remedial plan. Appellees' Br., 18-21. They argue that "[n]o deference to state redistricting policy is required . . . in simply determining whether a legislatively-enacted congressional redistricting plan violates Article I, § 2." *Id.*, at 19. Appellees thus would oblige a court reviewing a redistricting plan to perform the following functions:

> Initially, the court would determine whether there existed any available plan with a smaller census population deviation than the one enacted. If so, it would find bad faith and declare the legislature's plan unconstitutional. See Appellees' Br., 8.
>
> Next, and only then, in deciding what kind of plan to adopt as a remedy, the court would defer to legislative policy and adopt a redistricting plan as close as possible to the legislature's original, even though alternatives (less like the legislature's plan) might exist with smaller census population deviations. See Appellees' Br., 18-21; *White v. Weiser*, 412 U.S. 783 (1973).

The absurdity of appellees' proposed regime may be illustrated by an example. Consider a legislature pre-

sented with three redistricting plans: Plan A, with a deviation of 0.7%; Plan B, a variation on Plan A, with a deviation of 0.6%; and Plan C, radically different from the other two, but with a deviation of 0.5%. Under appellees' proposal,

> *If the legislature enacts Plan A*, the reviewing court would be compelled to find the plan unconstitutional because of the existence of other plans with smaller deviations. However, in devising a remedy, under *White v. Weiser* the reviewing court would give weight to the legislative judgment and adopt Plan B rather than the radically different Plan C.
>
> *If the legislature had itself enacted Plan B*, however, the court would have struck it down because the "very existence" of Plan C rendered it unconstitutional.

Thus if, as appellees argue, the standard for judicial review of legislative plans requires less deference to legislative choices than the standard for judicial formulation of a remedy, a court might be placed in the incongruous position of implementing, as a remedy, a plan it would have held unconstitutional if enacted in the first place by the legislature.

There is, of course, no reason of policy that would justify making district courts engage in this kind of farce. Appellees suggest none, and none exists. Either the legislature's policies are worth deference or they are not. If they are worth deference, they are worth deference in determining the constitutionality of the legislature's plan as well as in determining the proper remedy for an unconstitutional one.

Appellees also seek simply to ignore problems with the census data. They assert that the statistical imprecision of the census results solely from the undercounting of illegal aliens, and they view the record as deficient on the

question.[1] But the statistical imprecision of census data results from a variety of factors, only one among which is the undercounting of illegal aliens. See Appellants' Br., 16-18; App. 98-104.[2] Moreover, undercount is not synonymous with the statistical imprecision of the census.[3] Thus, appellees' discussion of what the law should be if the only errors in census data resulted from undercounting illegal aliens is simply beside the point. The central point is that one cannot meaningfully require more precision from redistricting plans than the underlying census data used to formulate those plans will permit.[4]

Moreover, the record sufficiently presents the questions this Court took this case to resolve. Dr. Trussell's statement (App. 97-104) was unchallenged below. Indeed, in the District Court appellees' counsel agreed to submit the

---

[1] Appellees appear now to have abandoned the contention, made in their Motion to Affirm, at 13-14, that the Constitution compels reliance on the census data in congressional redistricting.

[2] For example, preliminary estimates suggest that the undercount for black men aged 35 to 54 is about 15%. J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population in the 1980 Census by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis* (1982) (Current Population Reports, Special Studies P-23, No. 115).

[3] Consider a man looking at his bank statement. If the bank says that only half of his deposits have been credited, he has been undercounted. If the bank tells him that somewhere between 95% and 105% of his deposits have been credited—but doesn't tell him precisely how much—his problem is imprecision.

[4] This is not, as appellees suggest, a "resurrection of the *de minimis* theory" rejected before by this Court. Appellees' Br., 8. We do not contend that there is any statistically significant minimal deviation, such as the 5.97% in *Kirkpatrick*, or the 4.13% in *White*, which is permissible. However, the statistical imprecision of the data is an inherent limiting factor on the uses to which the data can meaningfully be put. Where, as here, an infinitesimal deviation is within the statistical imprecision of the data, it is not a *de minimis* deviation, but the functional equivalent of no deviation at all.

case for decision without the presentation of live witnesses "as long as all the submissions, all the depositions, all of the affidavits are received in evidence." Transcript of Proceedings, February 26, 1982, at 56-57. *See* Fed. R. Civ. P. 56(e). Appellees were content with the breadth of the record in the court below. They have no basis for complaint now.

II.

Appellees insist that the New Jersey legislature's concern for minority voting strength was only "pretextual," and its concern for population equality merely "aspirational." Appellees' Br., 11, 22.[5] In fact, protection of minority voting strength was a concern of the leadership throughout consideration of the various plans,[6] and support of legislators from districts with substantial minority populations was essential to its ultimate passage.[7] The District Court, however, declined to consider whether the legislature's desire to preserve minority voting strength justified the deviations primarily because the court felt that the legislature had to show, but had not shown, a direct connection between the population variances in the Fourth and Sixth districts and the minority concentra-

---

[5] This question, of course, is relevant only if the Court rejects our main argument that deviations less than the statistical imprecision of the census data are the functional equivalent of zero.

[6] *See, e.g.*, Jackman Deposition at 12, 14, 91; Karcher Deposition at 125, 136.

[7] P.L. 1982, c.1, passed the Senate 21-18 and the Assembly 42-34. 70 New Jersey Legislative Index No. 3, at S17 (January 31, 1983). In the Senate, the minimum number of votes required for passage is 21; in the Assembly, 41. *New Jersey Const.* Art. IV, § 2, par. 1, 3; Art. IV, § 4, par. 6. Thus the bill passed the Senate with the absolute minimum required, and the Assembly with only a single vote to spare. Obtaining the support of minority political leaders, *see, e.g.*, Gibson Statement, App. 86-90, was both good politics and good government.

tion in the Tenth.[8] We have argued at length in our main brief, pp. 35-37, why we believe the District Court erred, and will not repeat that argument here.

Two points do require brief rejoinder, however. Appellees claim that appellants' counsel conceded below that he could not say with certainty that the district lines were drawn in order to avoid dilution of minority voting strength. Appellees' Br., 12 n.5. This is a misreading of the record: counsel was not answering the question appellees say he was.[9] Second, appellees argue that S. Howard Woodson's affidavit is "self-contradictory" because of

---

[8] In addition, the District Court relied on the fact that Orange (a city with a high concentration of minority groups) was not added to the Tenth District. Opinion, J.S. 9a-10a. But, as we have pointed out before, there is no basis for drawing a negative inference from this fact. Orange had been in the Eleventh District in the 1970 redistricting; and there is no evidence to show whether it could have been moved into the Tenth District without removing an equal number of minority voters, or how the missing voters could have been made up in the Eleventh District.

[9] Appellees state that

> "When asked by the District Court at oral argument *whether he had any evidence to demonstrate that the districts were drawn in order to avoid the dilution of minority strength,* counsel for appellants was forced to concede that he 'could not say that happened with certainty . . . .'"

Appellees Br., 12 n.5 (emphasis supplied). The answer is right, but the question is wrong. The transcript reads as follows:

> JUDGE GIBBONS: And the 4th, how does that bear on the underage in the 10th?
>
> MR. WALSH: All right.
>
> If one is putting together a map which reflects community interests and the 10th is one such jigsaw, and here is the 10th (indicating), the 10th itself is surrounded by a salient from the 7th, and thereafter is abutted by the 6th; as population and towns with communities of interest have moved in one district, as the Baer plan suggests and as the consensus developed around the law which was actually passed, other district lines move as well which may change their deviation. I can't say that happened with certainty. There were many con-

his views about the best road to minority political power in New Jersey. Appellees' Br., 12-13 n.5. Mr. Woodson believes that minority groups should seek amalgamation of minority votes in those cases where the effect is majority control in one district, such as New Jersey's 10th, but division where majority control is impossible and division would yield substantial influence in *two* districts. See his Affidavit, App. 93-96. It remains a reasonable position, whether or not it is shared by appellees' counsel. Minority political leaders are entitled to act upon their own view of what is in their constituents' best interests.

III.

Amicus the Republican National Committee takes a different tack. Amicus recognizes that the deviations in P.L. 1982, c.1, are not "inherently unconstitutional," *Amicus* Br., 6, and instead argues that the New Jersey plan is invalid because "a dominant motive" of the legislature was "a desire to dilute Republican voting strength." *Amicus* Br., 7.[10] The District Court made no such find-

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versations and judgments which went into the passage of the present law.

App. 181. In other words, the question which counsel could not answer with certainty was *not* "whether he had any evidence to demonstrate that the districts were drawn in order to avoid the dilution of minority voting strength," but whether he could show a relationship between the composition of the Fourth and Tenth Districts.

[10] *Amicus* also, somehow, finds "bad faith" in the statement of Speaker Alan Karcher that he would not even consider any plan with a deviation greater than 1%. *Amicus* Br., 8. But Speaker Karcher did not lose sight of the goal of absolute district equality for plans below the 1% mark; he simply refused even to consider plans with a greater deviation. As he testified on deposition:

Q What did you mean by Principle A, equality of population in the various districts?

A What do I understand that to mean?

[Footnote continued on page 8]

ing; no such charge was made below; and consequently, none of the parties in the District Court even attempted to construct a record upon which such a claim could be judged.[11] In any event the claim is belied by the 1982 elections, which demonstrated that—as usual—the race goes to the incumbent. New Jersey has fourteen congressional districts. Incumbents ran in all fourteen districts, and won in thirteen.[12] In fact, the composition of New Jersey's House delegation virtually parallels the composition of the House as a whole.[13] Notwithstanding the contrary view of the Republican National Committee, the 1982 New Jersey election returns show no "dilution" of Republican voting strength—just the choices of voters in a typically good year for incumbents.

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[10] [Continued]

Q Yes.

A I understand that to mean that there is the population divided by the number of districts within the State; that that figure, that mathematical certainty of what the ideal district is established thereby; that for purposes of reality, that that model district, if you will, is aspirational, and that was the word that was used; that we have to anticipate that that figure of model district will be—has to be taken within the context of reality as aspirational, *but that we should never lose sight of the fact that is what you should strive for and that is really the hallmark of the process.*

Karcher Deposition, 23-24 (emphasis supplied).

[11] Plaintiffs below did introduce the "Jackman Letter," App. 35. But uncontradicted deposition testimony shows that the letter, while written at Mr. Jackman's direction, was not written by him and not even signed by him. Jackman Deposition 39-40, 135-137.

[12] The sole unsuccessful incumbent was Harold Hollenbeck, a Republican running in the Ninth District. The remaining incumbent, Millicent Fenwick, sought election to the Senate.

[13] The House as a whole contains 268 Democrats and 165 Republicans, and thus is 62% Democratic. The New Jersey congressional delegation contains 9 Democrats and 5 Republicans, and thus is 64% Democratic.

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No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLEES

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On Appeal from the United States District Court for the District of New Jersey

---

BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLEES

The Republican National Committee submits this brief as *Amicus Curiae* in support of Appellees' claim that the judgment of the United States District Court for the District of New Jersey, entered on March 8, 1982, should be affirmed. Pursuant to Rule 36.2, all parties to this action have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS

The Republican National Committee is a non-profit, unincorporated association whose main purpose is to promote the election of members of the Republican Party to public office. The Republican National Committee seeks the maintenance of fair election procedures in New Jersey so that partisan congressional redistricting will not dilute the voting rights of the citizens of New Jersey generally and members of the Republican Party specifically.

SUMMARY OF ARGUMENT

The district court below properly invalidated the congressional redistricting plan embodied in P.L. 1982, c.1, because of the failure of the New Jersey Legislature to make a good-faith effort to minimize the plan's population deviations as this Court's prior rulings require. New Jersey did not make a good-faith effort because, in the process leading to the adoption of the districting plan in dispute, population considerations were subordinated to partisan political interests.

Article I, § 2 of the United States Constitution requires an emphasis on the redistricting process and not, as Appellants argue, a focus on the end result alone. That requirement demands that the New Jersey Legislature make a good-faith effort to achieve the greatest population equality practicable, and does not leave the legislature free to debase the votes of political minorities and disregard the mandate of good-faith on the basis of arbitrary numerical approximations of equality. The court below properly concluded from the record that deviations from equality in P.L. 1982, c.1 were the result of a desire to entrench political interests, and only nominally the result of an effort to achieve population equality.

The lower court further concluded that Appellants failed to adequately justify those deviations from absolute equality found in P.L. 1982, c.1. Just as the acceptable population variances for congressional redistricting plans are low, so the acceptable justifications for any such variances are few. Appellants' emphasis on statistical aspects of the census is nothing but a disguised attempt to convince this Court to overrule prior decisions that declined to allow as *de minimis* deviations from equality that were not necessary. Further, Appellants' attempt to justify the deviations as intended to preserve minority voting strength is impeached by the record and is nothing but a cynical attempt to mask the true legislative purposes. Both proffered justifications are *ex post*

facto attempts to excuse the legislature's failure to make a good-faith effort to minimize deviations.

As Appellants' arguments demonstrate, there has been considerable recent litigation as to the meaning of this Court's directives in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), that a legislature must make a "good-faith effort to achieve precise mathematical equality." *Id.* at 530-31. In affirming the judgment of the court below, this Court has an opportunity to emphasize the proper application of *Kirkpatrick*.

ARGUMENT

I. LACK OF A GOOD-FAITH EFFORT TO MINIMIZE POPULATION DEVIATIONS IN CONGRESSIONAL REDISTRICTING CANNOT BE JUSTIFIED AND RENDERS THE CONFIGURATION CONSTITUTIONALLY INFIRM

A. Article I, § 2 of the United States Constitution Requires That a State Make a Good-Faith Effort to Achieve Population Equality Among Congressional Districts

In its first substantive congressional redistricting case, this Court enunciated the fundamental status of the right to vote in these terms: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964).

The right to vote can be undermined in many ways, directly or indirectly, sophisticatedly or simple-mindedly, innocuously or invidiously. To eliminate such voter discrimination, this Court further held in *Wesberry* that, "[t]he command of Art. I, § 2, that representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional

election is to be worth as much as another's." *Id.* at 7-8 (footnotes omitted). After surveying the history behind Art. I, § 2 of the United States Constitution, the Court concluded that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18.

In *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530-531 (1969), the *Wesberry* standard of "as nearly as practicable" was held to require the state to "make a good-faith effort to achieve precise mathematical equality." In rejecting the argument that a fixed numerical variance, if minute enough, should be ignored as *de minimis*, this Court held that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." *Id.* at 531. *Accord*, *White* v. *Weiser*, 412 U.S. 783, 790 (1973); *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969).

If these statements have any meaning, it is that no proffered justification will support a congressional districting plan where the state has failed to make an effort, in good faith, to minimize deviations from population equality. "Good faith" is the touchstone of *Kirkpatrick* and should remain the controlling standard in this case.

Appellants assert that "[t]he District Court read *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *White* v. *Weiser*, 412 U.S. 783 (1973), as invalidating any legislatively drafted congressional redistricting plan if it is possible that a plan with smaller census population deviations could be developed." Brief for Appellants at 7. Upon this assumption, Appellants then argue that there is no basis in law for such a standard and, therefore, that

"*Kirkpatrick* and *White* are satisfied when the Legislature's plan shows deviations from absolute census population equality that are less than the statistical imprecision of the census." *Id.*

Appellants' reading of the lower court's decision is wrong and their effort to limit *Kirkpatrick* and *White* is an unfounded and erroneous interpretation of the well-settled, well-reasoned principles of constitutional law enunciated by this Court.

The approach and emphasis in all redistricting cases is on the legislative good-faith effort.[1] Appellants rely on an arbitrary approximation of equality which focuses on the end result, purporting to legitimize the entire districting process on that basis alone. To adopt a *de minimis* rule, as Appellants urge, would permit a state to debase an individual's vote and avoid judicial scrutiny simply on the basis of an arbitrary numerical measure, and would negate the Court's prior determination that "[t]he right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." *Wesberry* v. *Sanders*, 376 U.S. 1, 7 (1964).

The good-faith standard serves as a check on vote debasement and demands that the legislative process strive for equality of value of an individual's vote by not per-

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[1] Although it involves redistricting of a state legislature under the Equal Protection Clause of the 14th Amendment, *Reynolds* v. *Sims*, 377 U.S. 533 (1964), derives its holding from *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and is relied on significantly in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969). The *Reynolds* definition of "as nearly as practicable" focuses on effort, not result:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a state *make an honest and good-faith effort* to construct districts . . . as nearly equal of population as is practicable.

377 U.S. at 577 (emphasis supplied).

mitting the pursuit of a certain political result to submerge the goal of population equality. This Court has clearly recognized that variance, whether large or small, "in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." *Wells*, 394 U.S. at 546 (quoting *Kirkpatrick*, 394 U.S. at 533).

Amicus does not suggest that the deviations produced by P.L. 1982, c.1 are inherently unconstitutional. To do so would be to assert a *de minimis* argument. There may be circumstances where such deviations would be the acceptable result of a good-faith effort to minimize deviations. Although, in a proper case, numbers may be one indication of good faith, they are not, in and of themselves, the measure of good faith. Appellants' attention to the numerical end result of the legislative activity rather than to the activity itself is misplaced. Appellants lost below because of the court's assessment of the legislative purpose and not, as Appellants urge, because the lower court demanded the smallest possible deviation without regard to what the rest of the record showed.

Appellants' argument erroneously focuses on the raw numbers involved and thereby assumes that the final result is prima facie constitutional because it is claimed that the population deviation is within the statistical imprecision of the census. Such an approach wrongly equates the size of the deviation from complete equality with legislative good-faith efforts. These two factors, good faith and absolute equality, are not interchangeable standards. It is good faith that is the proper measure of the constitutionality of the numerical result.

Recognizing that mathematical absolutism in congressional redistricting may, as a practical matter, be beyond reach, *Kirkpatrick* and *White* hold that the inability to

achieve precise mathematical equality must not dissuade state legislatures from striving toward the goal of complete equality in representation. Under *Kirkpatrick* and *White*, therefore, a good-faith effort must remain in the forefront of the legislature's considerations.

If variances in the population of congressional districts are to be upheld, a court must determine, before turning to the justifications that are asserted in defense of the variances, that the variances were not produced in bad faith. Equality in district population, not the representation of political interests, must be the state's preeminent goal. The emphasis in *Kirkpatrick* was—and should be in the case at bar—on the legislative good-faith effort, not on the numerical end result alone.

B. The District Court Properly Found a Lack of Legislative Good Faith

The record in this case amply supports the conclusion below that the New Jersey Legislature did not make a good-faith effort to achieve population equality. The court explicitly found that the legislature regarded some dilution of the vote as acceptable if the result was to advance partisan interests. For example, examination of the record leads inescapably to the conclusion that a dominant motive was the legislative leadership's desire to dilute Republican voting strength. Judge Gibbons, although dissenting, agreed with the court's factual findings that adherence to the goal of population equality was a pretext.[2]

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[2] I join fully in the court's findings of fact and in the rulings on the motions. In particular, I agree that the only effort made by the Democratic legislative leadership to comply with *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed. 2d 519 (1969) was Mr. Karcher's instruction that no plan would be considered which had a population deviation greater than one per cent. . . .

535 F. Supp. at 983, J.S. at 11a (Gibbons, J., dissenting).

Equality of population was not the controlling consideration in New Jersey's redistricting effort but "this constitutional requirement was viewed as merely aspirational, ..." *Daggett* v. *Kimmelman*, *Id.* at 982, J.S. at 8a-9a.

Although Appellants' principal contention is that the good-faith standard as enunciated in *Kirkpatrick* is satisfied by numbers alone, it is clear that this Court did not intend such a simplistic yet rigid rule. Rather, the *Kirkpatrick* opinion does not attempt a general definition of good faith but correctly holds that the standard must be applied to the particular facts presented:

> The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. *Kirkpatrick*, 394 U.S. at 530.[3]

The explicit finding by the court below of a prominent New Jersey legislator's use of a one percent population deviation cutoff point was a finding of bad faith in its most reprehensible form—an intentional effort to limit this Court's prior holdings that population equality is the basic command of the redistricting process.[4]

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[3] Such a definition of good faith is likewise utilized in state legislative redistricting analysis:

> Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman v. *Sincock*, 377 U.S. 695, 710 (1964).

[4] As this Court has previously stated:

> We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*. Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable. The district court found, for example,

Appellants' argument that "[t]he constitutional requirements of Article I, § 2, ought not to be reduced to such an illusory quest for mathematical precision," Brief for Appellants at 9, neglects to address the fundamental question raised by the *Kirkpatrick* standard. The real issue before this Court can neither be characterized as the extent of permissible deviation nor as the relationship of deviation to census error. Rather, the proper issue before this Court is whether the proponents of P.L. 1982, c.1 properly met the mandate of *Kirkpatrick* that the resulting population variance was "unavoidable despite a good-faith effort to achieve absolute equality." *Kirkpatrick*, 349 U.S. at 531. The district court below found the deviations existing in P.L. 1982, c.1 neither unavoidable nor produced in good faith:

> It is clear that the .6984% population deviation of P.L. 1982, c.1 is not unavoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%. For example, the Reock plan contained a total deviation of .3250% and only .2960% after it was amended. The DiFrancesco plan, S-3547, introduced on January 4, 1982, had a total deviation of .1253%. The Hardwick plan, A-3817, introduced on January 12, 1982, contained a total deviation of .4515% The Bennett plan, A-614, and the Kavanaugh plan, A-615, although introduced one day after P.L. 1982, c.1 was signed into law, contain total deviations of .1369% and .0293%, respectively.
>
> . . . .
>
> While acknowledging that plans with lower deviations than P.L. 1982, c.1 existed, the leadership be-

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that at least one leading Missouri legislator deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality.

Kirkpatrick v. *Preisler*, 394 U.S. at 531.

> lieved that population equality was not the only standard.

Daggett v. *Kimmelman*, 535 F. Supp. at 982, J.S. at 8a.

Furthermore, that the district court included as an appendix to its opinion the full text of Speaker Jackman's response to Ernest C. Reock, Jr.'s proposed redistricting map is a clear indication that the Court understood that the true purpose of P.L. 1982, c.1 was to dilute Republican votes as much as possible within a one percent deviation. While Mr. Reock had proposed what he felt to be a politically fair map, Speaker Jackman made it clear that his party's overriding motivation was to maximize Democratic electoral strength, not to minimize population deviation.

The events surrounding the passage of P.L. 1982, c.1 clearly dispute the proffered motivations and justifications now offered in its support. The legislative leaders railroaded a physically and politically gerrymandered bill through the legislature. At the eleventh hour, a lame duck governor signed the bill, precluding involvement by a successor who belonged to another party. The combined action of the legislature and the Governor created an aura of bad faith that permeated the record in this case.

The court below concluded from all the evidence that the New Jersey Legislature had failed to heed the one inexorable mandate this Court has expressed in each of its redistricting decisions since *Baker* v. *Carr*, 369 U.S. 186 (1962). The paramount concern of the legislators in fashioning the New Jersey congressional redistricting plan was a judgment that political affiliation of voters is more important than equally populated districts. Although unavoidable divergences from population equality may be permissible if grounded on legitimate justifications, this Court has never held that the search for equality may be approached by a legislature with the primary intention

that variances may be made for the purpose of diluting the strength of a political minority,[5] and then proceed to purposely ignore mathematical equality and draw district configurations in the belief that such variances may be later justified on other grounds.[6]

The overriding preoccupation of the New Jersey Legislature with factors other than population equality negates any contention that the deviations in P.L. 1982, c.1 resulted despite a good-faith effort to achieve equality. The desired end—enhancement of partisan political interests—controlled the redistricting process in New Jersey and, accordingly, submerged the constitutional mandate of voting equality to a level of pure partisan politics and legislative greed.

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[5] Just as this Court has left open the justiciability of political gerrymandering under the Fourteenth Amendment, so also does Article I, § 2 provide a vehicle to limit gross discrimination against political minorities in congressional districting. The Fourteenth Amendment prohibits intentional discrimination against "racial and political elements of the voting population," *Fortson* v. *Dorsey*, 379 U.S. 433 (1965). Article I, § 2 must be read to similarly prohibit any arbitrary and invidious action which does not constitute a good-faith effort by the State to limit population disparities among congressional districts. As set forth *infra* n. 7, legislative motives can and should be looked to for evidence of bad faith and mal-intent in the context of congressional districting. The record below adequately supports the district court's finding that Appellants were not motivated by a desire to minimize population disparities, but rather a desire to minimize Republican electoral strength.

[6] Although confronted with a sophisticated as opposed to a simple-minded method of voter discrimination, the district court correctly perceived the argument of Appellants as no more than a numbers argument attempting to mask the conspicuous bad faith of the New Jersey Legislature; "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" *Reynolds* v. *Sims*, 377 U.S. 533, 563 (1964).

II. NOT ONLY HAVE APPELLANTS FAILED TO DEMONSTRATE A GOOD-FAITH EFFORT TO MINIMIZE DEVIATIONS, THEY HAVE FAILED TO JUSTIFY THOSE DEVIATIONS

A. The Only Applicable Justification in This Case Is Good Faith

This Court in *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), stated that "there is a burden on the proponent of any districting plan to justify deviations from equality." *Id.* at 544. Just as the acceptable population variances for congressional redistricting plans are low, so the acceptable justifications for any such variances are few. This Court has suggested but three possible justifications for deviations from equality in congressional redistricting cases brought under Article I, § 2 of the United States Constitution.

Primary among these, of course, is this Court's statement in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), that some deviation is acceptable if the state can show that it is "unavoidable despite a good-faith effort to achieve absolute equality." *Id.* at 530-31.

Secondly, the *Kirkpatrick* Court suggested that it might permit some population disparities between congressional districts resulting from the legislature's attempt to take into account projected population shifts, but only where these shifts can be predicted with a high degree of accuracy and are thoroughly documented and applied in a systematic manner statewide. *Id.* at 535.

Thirdly, this Court hinted in *White* v. *Weiser*, 412 U.S. 783 (1973), that the state's interest in minimizing the disruption in existing relationships between members of Congress and their constituents might justify variances. *Id.* at 791-92.

There is no claim here that the second and third possible justifications are applicable. Moreover, the only justifica-

tion for population divergences squarely addressed by this Court has been the *Kirkpatrick* Court's good-faith effort justification.[7]

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[7] This Court need not exceed the boundaries of *Kirkpatrick*, as Appellants would have this Court do, to resolve the issues raised in this case. Since the *Kirkpatrick* standard revolves around the good faith of the legislature, the standard could be characterized as one of legislative intent, with the emphasis on the legislative effort or process, rather than upon the end result. It is, in fact, unnecessary to even address the issue of justification if the focus is placed solely on the good-faith intentions of the legislature since proper justification mandates good-faith effort. This Court has, in two recent lines of cases, explained how legislative or state intent is to be determined.

Beginning with *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), and culminating recently in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), and *Rogers* v. *Lodge*, 102 S.Ct. 3272 (1982), this Court has dealt with proof of legislative intent to discriminate in constitutional civil rights litigation.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), this Court used a similar approach in holding that state subordinate jurisdictions can invoke antitrust immunity by pointing to legislative authorization or legislative contemplation of municipal action in a specific area. *Id.* at 1138.

The methods of proof of intent in civil rights litigation are applicable to antitrust litigation. While in the first instance, a governmental entity would generally be attempting to defend against charges of discriminatory motive and in the second instance attempting to prove state legislative motive, the principles involved in each are related. In both situations, the policy underlying an official action is the determinative factor.

Amicus suggests that an analogous approach can be taken to determine whether a legislature has acted in good faith to minimize population deviations. Such a determination would demand a "sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights*, 429 U.S. at 266. In its *Arlington Heights* decision, this Court set forth a non-exhaustive list of factors which are subjects of proper inquiry in determining legislative motive or intent:

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events lead-

B. Appellants' Reliance on the Statistical Imprecision of the Census Is Not a Justification, But a Disguised *De Minimis* Argument

Appellants' primary argument is that this Court should accept the premise that a reapportionment plan that contains deviations below what Appellants claim to be the statistical imprecision of the census data satisfies *Kirkpatrick* and *White*. In effect, Appellants attempt to modify this Court's prior rejection of the argument "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard." *Kirkpatrick*, 394 U.S. at 530.

Appellants' argument that a deviation within the range of the statistical imprecision of the census satisfies *Kirkpatrick* is nothing but an attempt to establish a claimed statistical margin of error of the census as a *de minimis* standard. The district court below recognized this device and explicity rejected such an approach. *Dagget* v. *Kimmelman*, 535 F. Supp. 978, 893, J.S. at 10a.

> ing up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.

Id. at 267-8 (citations and footnotes omitted).

This approach is a workable one, and is consistent with the district court's approach below in reviewing the motives of the New Jersey Legislature.

To adopt Appellants' disguised *de minimis* argument would be antithetical to the true nature of this case. The district court's decision did not turn on the numbers involved but on the failure of the legislature to justify adequately its selection of those numbers. Applying the *Kirkpatrick* standard, the court below determined that P.L. 1982, c.1 could "withstand constitutional attack only if the population variances 'are unavoidable despite a good-faith effort to achieve absolute equality, or . . . [if] justification is shown'." *Id.* at 982, J.S. at 8a. The lower court's standard most certainly was not that which Appellants maintain the court applied: ". . . that the legislature acts unconstitutionally unless it adopts that plan which has the smallest census population deviation. . . ." Brief for Appellants at 15.

Moreover, the factual premise for Appellants' census data argument is lacking. Any estimate of the statistical imprecision of the census is an estimate of a national undercount. These estimates are based on statistical samples conducted after the census. However, the error factor in the census is not known until well after most states have completed the redistricting process, and cannot be used to weigh the deviations of particular plans.

By their own admission, Appellants have no idea what the statistical imprecision of the census really is. Brief for Appellants at 17. The figures presented by Appellants have no solid basis, nor are they applicable nationwide, statewide, or even citywide. There is currently no single, statistically-defensible method to calculate census error in a timely fashion, so there is no basis to compare the deviations of P.L. 1982, c.1 with any specific figure representing census error. The Bureau of the Census has devoted considerable resources to determining the margin of census error, but the various techniques currently used have "inherent difficulties" which may be insurmount-

able.[8] Appellants have no basis for claiming that the 0.6984% deviation in this case is "the functional equivalent of zero." Brief for Appellants at 15. Their claimed ability to show a margin of census error is not, and cannot be, substantiated.

Moreover, the use of data other than actual census data poses a practical problem in the establishment of congressional district lines within a state once congressional seats have been apportioned. Federal law requires state population figures to be produced within nine months after the census date and local figures by three months later. This precludes adjustment of any errors in the census figures by any of the means available.[9] The amount of time after the census date that is required for completing estimates of any undercount for states and substate areas, and then adjusting the count, requires a considerable amount of data other than the census tabulations themselves. The National Academy of Sciences—in a report relied upon in the Brief for Appellants—concludes that one method would require a year and a half to make such adjustments, while other more accurate means would require approximately three years after the census date to adjust census figures.[10]

Because population is constantly shifting within a state, absolute mathematical equality in relation to the true population of districts within a state is impossible both at the time of redistricting and throughout the subsequent decade. Nonetheless, experience in the two decades of redistricting since the Court has adopted the "one

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[8] Testimony of Bruce Chapman, Director of the Bureau of the Census, Field Hearing Before the U.S. Senate Committee on Governmental Affairs, Albuquerque, New Mexico (August 23, 1982), at 8.

[9] National Academy of Sciences, National Research Council, *Counting the People in 1980: An Appraisal of Census Plan* (1978), p. 110.

[10] *Id.* at 105.

person, one vote" standard clearly shows that precise mathematical equality in relation to the census has been achieved time after time to a significantly greater degree than the deviations of the districts here in question. *Cf.* Brief for Appellants at 24, n.20. The fact remains that the census, even if not perfect, is the only reference point from which a good-faith effort to achieve population equality is both possible and measurable.

Moreover, the decennial census is the historic and constitutionally mandated basis for congressional apportionment and redistricting. The very section of the Constitution that provides the basis for the Court's one person, one vote ruling—Article I, § 2—sets forth the decennial census requirement. As a result, the use of data other than actual census data in apportioning the U.S. House of Representatives could present constitutional issues far beyond the issues presented by this case.

In any event, that the census may not be precise is not the issue in this case. The *Kirkpatrick* opinion implicitly recognized the existence of a margin of census error; while the Court pointed out that the census data was "the best population data available to the legislature," 394 U.S. at 528, the Court did allow for the possibility of accommodating population changes occasioned by population shifts, *Id.* at 535. *See also Id.* at 539 n. 3 (Fortas, J., concurring.) As recently as this year, this Court pointed out that, from the time of the very first census, inaccuracies have occurred. *See Baldridge* v. *Shapiro*, 102 S.Ct. 1103, 1109 n.8 (1982).

The New Jersey Legislature make no effort to account for census inaccuracies or to take into account future population shifts. Rather, its leadership determined that a one percent deviation would facilitate partisan gerrymandering—and the record shows that it was this effort to dilute the vote of the political party that was the legislative minority, not any good-faith effort to maximize

voting equality, that prompted rejection of plans with less deviation and greater equality.[11]

No doubt, the legislative majority hoped, as Appellants now urge, that this Court would adopt a *de minimis* standard notwithstanding *Kirkpatrick*. This Court has consistently refused to set such a standard and, unless it is willing to do so at this time and thus establish partisan gerrymandering as a hallmark of legislative good faith, Appellants' argument must be rejected.

Appellants are playing a sophisticated form of numerical gamesmanship. Their reliance upon a collection of inconsistent figures to confuse the issue in this case, Brief for Appellants at 15-18, shifts the proper focus of this case from evidence of good faith to numbers and percentages. Furthermore, Appellants are guilty of the very evil they attribute to the district court. It is Appellants' numbers game, not the decision below, that "substitutes the policies of computer programmers for those of the Legislature." *Cf.* Brief for Appellants at 25.

Appellants' numerical gamesmanship is further apparent in their suggestion that the good-faith/justification standard imperils redistricting plans adopted by other state legislatures under the 1970 census. Brief for Appellants at 22-25. This is but another smoke screen designed to obfuscate the true nature of this case.

This Court did not let such claims deter it from its course in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), in spite of the contention that the majority opinion "impugn[ed] the validity of the election of 398 Representatives from 37 states, leaving a 'constitutional' House of 37 members. . . ." *Id.* at 20-21. (Harlan, J. dissenting.)

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[11] Visual inspection of the map embodying P.L. 1982, c.1's congressional district lines is clear evidence of the motives of the legislative leadership.

Though the various district court panels may have approved redistricting plans with higher deviations than that presented here, the decisions cited by Appellants add nothing to the law already set down by this Court in *Kirkpatrick*: "The extent to which equality may practicably be achieved may differ from state to state and from district to district." 394 U.S. at 530.

C. Preservation of Minority Voting Strength Was Not the Purpose of the Population Variances in This Case

Appellants further attempt to justify the population divergences in P.L. 1982, c.1 by suggesting that "[e]ven if the deviations in P.L. 1982, c.1, were avoidable, they are justified by the legislative policy of preserving minority voting strength." Brief for Appellants at 34.

All three judges below, including dissenting Circuit Judge Gibbons, agreed that Appellants' attempts to justify the population deviations in the plan adopted by the legislature in terms of preserving minority voting strength were merely pretextual. *Amicus* respectfully suggests that Appellants' *ex post facto* attempt at justification is not only a pretext but a cynical attempt to mask the true effect of P.L. 1982, cl.1 on minority voting power.

Although a bill was introduced that would have further enhanced minority voting strength in the Tenth Congressional District, *See* Motion of Edwin B. Forsythe, et al. to Affirm at 10, P.L. 1982, c.1 diluted minority voting strength by placing the City of Orange in the Eleventh rather than the Tenth District. *Daggett* v. *Kimmelman*, 535 F.Supp. 978, 982-3 (1982).

The legislative majority sought not to enhance minority voting strength, but to entrench its party's political position. That the latter objective was accomplished at the *expense* of minority voting strength in the Tenth and

Eleventh Districts makes the attempted justification further suspect.[12]

The district court recognized the political cynicism underlying this purported justification, and correctly arrived at the factual conclusion that there had been no demonstration of a "causal relationship between the goal of preserving minority voting strength in the Tenth District and the population variances in the other districts." 535 F.Supp. at 982.

III. AFFIRMANCE OF THE DECISION BELOW PROVIDES THIS COURT WITH AN OPPORTUNITY TO RESOLVE THE UNCERTAINTY OVER THE PROPER APPLICATION OF *KIRKPATRICK* v. *PREISLER*

Amicus maintains that the judgment of the district court below is supported both by the record and by this Court's expressed standards. Assuming that the decision below is affirmed, as *Amicus* urges, it will then be necessary for the legislature—or in the event of failure there, the district court—to establish a new congressional redistricting plan. The key issue almost certainly will be what factors are constitutionally acceptable in justifying

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[12] Appellants suggest that the preservation of minority voting strength to justify inequalities in districts is supported by this Court's opinion in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Appellants' reliance on this case is improper since *Carey* involved the apportionment of a state legislature and was a case brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c). While we would not dispute Appellants' statement that "Section 5 applies as well to congressional reapportionment," Brief for Appellants at 34, n. 36, neither Section 5 nor *Carey* are applicable here.

This is a case brought under Article I, § 2 of the United States Constitution, not the Voting Rights Act, nor the Fourteenth Amendment, nor the Fifteenth Amendment. New Jersey has never been subject to Section 5 of the Voting Rights Act, so a Section 5 analysis is inappropriate here. This case is governed, then, by the principles set forth by this Court in *Kirkpatrick* and other Article I, § 2 cases, not by *Carey*.

deviations from the ideal of absolute population equality among districts.

The decisions in other recent cases have evidenced uncertainty over the appropriate standards to be applied by either a legislature or a court undertaking a redistricting effort.[13] It is therefore appropriate for this Court to pro-

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[13] State legislatures wrestled with redistricting after the 1980 census with varying degrees of success. Of the forty-two states required to redistrict on the basis of the 1980 census, twenty-five became embroiled in litigation concerning the placement of new congressional district lines: Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, West Virginia, and Wisconsin. *See* Council of State Governments & National Conference of State Legislatures, *1 Reapportionment Information Update*, Nos. 1-8 (1981-82).

Legislatures in those states whose congressional delegations changed in size after the 1980 census faced the most difficult redistricting task. Of the nineteen states that were forced to readjust drastically their congressional districts to accommodate this change, nine failed to achieve a completely acceptable plan. Of that nine, four states—Colorado, Illinois, Michigan, and Missouri—failed to enact redistricting statutes, forcing the United States District Courts in those states to construct redistricting plans. Illinois and Missouri each failed to gain passage of a plan through both houses of their legislature. *See In re Illinois Congressional Districts Reapportionment Cases*, Master File No. 81 C 3915 (N.D. Ill. Nov. 23, 1971), *aff'd mem. sub nom. Ryan* v. *Otto*, 102 S.Ct. 985 (1982); *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo. 1982), *aff'd mem. sub nom. Schatzle* v. *Kirkpatrick*, 102 S.Ct. 2248 (1982). The Colorado and Michigan legislatures passed plans but were unable to override their governors' vetoes. *See Carstens* v. *Lamm*, 543 F. Supp. 68 (D. Colo. 1982); *Agerstrand* v. *Austin*, No. 81-40256 (E.D. Mich. May 24, 1982).

The results in the five remaining states where the legislature did pass a redistricting plan—Texas, California, Pennsylvania, Ohio and New Jersey—were mixed. Texas's enacted plan was modified by the district court under the terms of the Voting Rights Act. *See Upham* v. *Seamon*, 102 S.Ct. 1518, *rev'ing per curiam* 936 F. Supp. 931 (E.D. Tex. 1982). California's plan was rejected by the voters in

vide guidance for the further conduct of this proceeding and in the process, provide direction to other legislatures and courts.

Some questions that arose in this case and other redistricting cases following the 1980 census were resolved by *Kirkpatrick*, where the Court rejected a number of attempted justifications put forth by the State of Missouri for the population deviations inherent in the challenged plan. The state attempted to justify the deviations by suggesting (1) "that variances were necessary to avoid fragmenting areas with district economic and social interests"; (2) that the population differences were justifiable as "a reasonable legislative compromise"; and (3) that the variances resulted from the "State's attempt to avoid fragmenting political subdivisions." The *Kirkpatrick* Court rejected each of these proffered justifications as inadequate to justify a districting plan which did not otherwise pass constitutional muster. In rejecting two additional justifications proposed by the state that, (4) certain variances resulted from the legislature's "taking account of the fact that the percentage of eligible voters . . . differed significantly

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a referendum. *See Assembly* v. *Dukmejian*, 30 Cal. 3d 638, 180 Cal. Rptr. 297, 639 P.2d 939, *appeal dismissed and cert. denied sub nom. Republican National Committee* v. *Burton*, 102 S.Ct. 2003 (1982) Pennsylvania's plan was approved by the district court on the basis of legislative good faith. *See In re Pennsylvania Congressional Districts Reapportionment Cases*, Civil Action No. 82-0197 (M.D. Penn. Sept. 18, 1982). Ohio enacted a plan that is in a state of limbo. In *Flanigan* v. *Gillmore*, Case Nos. C-2-82-173, -394 (S.D. Ohio May 25, 1982), the district court held in abeyance the constitutionality of the Ohio plan's population deviation pending this Court's decision of the case at bar. Finally, of course, the New Jersey plan was declared unconstitutional by the district court in the decision appealed from here.

This analysis excludes South Dakota and Nevada. South Dakota's delegation was reduced to a single member, to be elected at large. Nevada's delegation was increased from one Representative to two, making the redistricting task limited to drawing a single boundary line.

from district to district," and (5) that the population disparities resulted "from the legislature's attempt to take into account projected population shifts," this Court found the proposals to be unsupported either by applicable law or the record in the case. 394 U.S. at 533-36.

Similarly, the district court below properly rejected Appellants' attempts to justify the population disparities among New Jersey's congressional districts as illusory, *ex post facto* explanations unsupported by the record.

While this Court outlined in *Kirkpatrick* the need for state legislatures to make good-faith efforts to minimize population disparities and to justify those disparities, there remains considerable diversity among the district courts in the application of the *Kirkpatrick* standard. Because of this disparity, there exists a more general need for this Court to elaborate on its *Kirkpatrick* decision. *Amicus* respectfully submits that the case at bar provides the vehicle to resolve those disparities by further discussion of the meaning of *Kirkpatrick* for the guidance of the legislature and the court below in the redistricting effort that must follow affirmance of the decision below.

Such action by this Court also would aid legislatures in their redistricting task, facilitate the successful performance of their redistricting duties, and help relieve the district courts of the considerable burden of repeatedly having to assume what should primarily be a legislative responsibility.

To the extent that United States District Courts would continue to act as redistricting mechanisms, additional direction from this Court would simplify that task and, in the process, would generate greater consistency in the factors applied in developing court-ordered plans. At present, the variation in criteria used by the district courts forced to redistrict by court order has created inconsistency in judicial opinions. While some district

courts adhere to a strict standard of population equality,[14] other courts have relegated attempts to minimize deviations to the same level as a variety of non-constitutional factors.[15]

The district courts are in considerable disagreement over the weight to be given factors other than population when formulating redistricting plans.[16] The varying justi-

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[14] *See La Comb* v. *Growe*, 4-81 Civ. 414 (D. Minn. March 11, 1982), *aff'd mem. sub nom. Orwall* v. *LaComb*, 50 U.S.L.W. 3915 U.S. May 17, 1982); *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo.), *aff'd mem. sub nom. Schatzle* v. *Kirkpatrick*, 102 S.Ct. 2248 (1982); *Agerstrand* v. *Austin*, No. 81-40256 (E.D. Mich. May 24, 1982).

[15] *See O'Sullivan* v. *Brier*, 540 F. Supp. 1200, 1206 (D.Kan. 1982) ("Modern computer technology would permit us to achieve almost zero deviation among districts if we ignored all other considerations. But *Kirkpatrick* did not address variances of the small magnitude at issue here. . . ." The court rejected a proposed plan with a deviation of 0.09%, adopting a plan with a 0.338% deviation.); *Doulin* v. *White*, 5353 F. Supp. 450 (E.D. Ark. 1982) (rejecting plans with deviations below 0.20% in favor of a court-ordered plan with 0.78% deviation); *South Carolina State Conference of Branches of the NAACP, Inc.* v. *Riley*, 533 F. Supp. 1178 (D.S.C.: 1982), *appeal docketed*, No. 82-535 (U.S. Aug. 25, 1982) (court adopted plan with 0.28% deviation, rejecting alternative plan with a deviation of 0.0656%).

[16] Courts have given substantial weight to legislative enactments vetoed by the governor, *Agerstrand* v. *Austin*, No. 81-40256 (E.D. Mich. May 24, 1982), or objected to under the Voting Rights Act, as amended, 42 U.S.C. 1973(c), *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeal docketed sub nom. Brooks* v. *Winter*, No. 82-233 (U.S. Aug. 10, 1982). However, other courts have given minimal weight to vetoed bills, regarding them as merely "proferred current policy." *Carstens* v. *Lamm*, 543 F. Supp. at 68, 79 (D.Colo. 1982); *O'Sullivan* v. *Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982).

The district court that redistricted Kansas regarded preservation of communities of interest "as the lodestar of our analysis." *O'Sullivan* v. *Brier*, 540 F. Supp. at 1204; *cf. Carstens* v. *Lamm*, 543 F. Supp. at 96; *La Comb* v. *Growe*, 4-81 Civ. 414, slip op. at 5 (D.Minn. Mar. 11, 1982), *aff'd mem. sub nom. Orwell* v. *LaComb*, 50 U.S.L.W. 3915 (U.S. May 17, 1982). The district court in Illinois,

fications accepted by the district courts suggests that, notwithstanding this Court's straightforward guidance in *Kirkpatrick* v. *Preisler*, confusion over the applicable standards in such cases is growing. As suggested by *Amicus*, *supra* n.7, this Court has already created the framework for a workable inquiry into the good-faith efforts of a state to minimize population deviations. Any clarification this Court might offer in eliminating misunderstandings regarding the proper application of *Kirkpatrick*, would not only serve to eliminate such confusion, but it would also help alleviate the overwhelming judicial backlog, and expedite the hearing of higher priority cases.

Appellants attempt to capitalize on the current disparity in reasoning among the district courts by suggesting that the treatment given the facts in other redistricting cases supports Appellants' mistreatment of the law in this case. In setting forth its seminal guidelines in *Kirkpatrick*, this Court noted that "[t]he extent to which equality may practicably be achieved may differ from State to State and from district to district," 394 U.S. at 530. Although the "circumstances of each particular case" may be weighed in determining the constitutionality of a given redistricting plan, *Id.*, nothing in *Kirk-*

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however, adhered to the premise that "to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical" to *Kirkpatrick*. *In re Illinois Congressional District Reappointment Cases*, No. 81 C 3915, slip op. at 25 (N.D.Ill. Nov. 23, 1982), *aff'd mem. sub nom. Ryan* v. *Otto*, 102 S.Ct. 985 (1982). While a significant number of district courts sought to preserve political subdivision boundaries, *e.g.*, *Carstens* v. *Lamm*, *La Comb* v. *Growe*, the court in Illinois rejected this criteria also as contrary to *Kirkpatrick*. *In re Illinois Congressional Districts Reapportionment Case*, slip op. at 25.

The goal of compactness and contiguity also has received varying treatment. The court in Missouri rated it second only to population equality as a redistricting standard, *Shayer* v. *Kirkpatrick*, 541 F. Supp. at 934 while the court in Colorado described it as "probably the least significant" of the non-constitutional criteria utilized. *Carstens* v. *Lamm*, 543 F. Supp. at 87.

patrick suggests that the *ad hoc* approach to redistricting standards advocated by Appellants—and used by a number of district courts since the 1980 census—is appropriate. *Kirkpatrick* permits the facts to be considered in light of applicable law; it should not permit, as Appellants maintain, those facts to change the law.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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November 8, 1982

NO. 81-2057-ATX	TITLE	Alan J. KARCHER, Speaker, New Jersey Assembly, et al., Appellants v. George T. Daggett, et al.

DOCKETED	COURT
May 6, 1982	United States District Court for the District of New Jersey

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellants: Kenneth J. Guido, Jr.
	Counsel for Appellees: Michael R. Cole, Jonathan L. Goldstein
Mar. 11, 1982	Application for stay filed, and order temporarily granting same by Brennan, J., Mar. 12, 1982.
Mar. 15, 1982	Response by Forsythe, et al. filed.
Mar. 15, 1982	Response by New Jersey Attorney General filed.
Mar. 15, 1982	Response by Daggett filed.
Mar. 15, 1932	Granted by Brennan, J., with memorandum opinion.
Mar. 18, 1932	Motion of appellees Forsythe, et al. to vacate or in the alternative to expedite appeal filed. (CFR, due COB 3-23)
Mar. 22, 1932	Motion of appellees Kean, et al. to vacate or in the alternative to expedite appeal filed.
Mar. 23, 1982	Memo by appellant in opposition to motion to vacate filed.
Mar. 25, 1982	Reply of appellees Forsythe to opposition to motion to vacate filed.
Mar. 29, 1982	Motions denied by order of the Court.
Apr. 8, 1982	Motion to modify stay filed by Forsythe.
Apr. 12, 1982	Response by appellant to motion to modify filed.
Apr. 14, 1982	Motion to modify denied by Brennan, J.
May 6, 1982	Statement as to jurisdiction filed.
May 20, 1982	Motion of appellees Edwin B. Forsythe, et al. to affirm filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 7, 1982	Reply brief for the appellants filed. (D).
June 21, 1982	Probable jurisdiction NOTED.

July 23, 1982	Order extending time to file the appellants' brief on the merits until Sept. 4, 1982.
Aug. 5, 1982	Joint appendix filed.
Sept. 3, 1982	Brief for the appellants filed.
Sept. 23, 1982	Order extending time to file the appellees' brief on the merits until November 8, 1982.
Nov. 8, 1982	Brief, amicus curiae, of The Republican National Committee in support of appellees filed.
	(Over)

81-2057

Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 10, 1982	Brief for appellees Edwin B. Forsythe, et al. filed.
Dec. 14, 1982	CIRCULATED.
Feb. 23, 1983	Reply brief for the appellants filed. (D).
March 2, 1983	ARGUED.